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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1923

CALIXTO AGAPITO, MARTHA CALDERON,
and HORACIO RUEDA,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

CALIXTO AGAPITO, MARTHA CALDERON, and HORACIO RUEDA,

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-against-

UNITED STATES OF AMERICA,

Respondent.

. . . . . .

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Calixto Agapito, Martha Carderon and Horacio Rueda petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Second Circuit, which affirmed judgments of conviction of the United States District Court for the Southern District of New York.

OPINION BELOW

The United States District Court for the Southern District of New York denied a motion to suppress physical evidence and statements in an opinion dated October 5, 1979 and reported in 477 F. Supp. 706 (see Appendix A).

The Court of Appeals affirmed the judgments of conviction in a Per Curiam opinion on March 12, 1980 not yet reported (see Appendix B). A petition for rehearing in banc was denied without opinion on May 7, 1980 (see Appendix C).

JURISDICTION

The judgments of the Court of Appeals were dated and entered on March 12, 1980. The orders denying the petition for rehearing in banc were dated and entered on May 7, 1980. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the illegal entry into, remaining in and seizure of a suitcase containing cocaine in a hotel room require the suppression of the cocaine, even if a valid search warrant was subsequently obtained.

2. Whether the search warrant violates the petitioners' constitutional rights under the Fourth Amendment and is invalid because probable cause to search is not contained within the four corners of the supporting affidavit, the agents withheld vital information from the magistrate, and the tainted portions cannot be excised.

3. Whether the federal agents' pressing their ears against a door connecting their hotel room with the hotel room of Agapito and Calderon and thus using the door to carry the sound of petitioners' movements and conversations constituted the use of a "mechanical device" under 18 U.S.C. §2510 and violated their constitutional rights under the Fourth and Fifth Amendments.

4. Whether the agents had probable cause to arrest petitioners.

5. Whether the petitioners' claims of constitutional violations are precluded, in part, by a lack of standing.

6. Whether the Trial Judge improperly commented to counsel and on the evidence in the presence of the jury and thereby deprived petitioners of a fair trial and due process of law under the Fifth Amendment.

7. Whether the prosecutor improperly commented on objections by defense counsel, pretrial suppression hearings, petitioners' failure to hire a chemist, and the prerequisite for bringing an accusation and thereby deprived petitioners of a fair trial and due process of law under the Fifth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment IV Searches and seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V Due Process

"No person shall be . . . deprived of life, liberty or property, without due process of law . . . . "

Statutes, United States Code 18 U.S.C. §2510(5)

" 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication . . . . "

STATEMENT OF THE CASE

Petitioners were tried before Honorable Irving Ben Cooper and a jury and convicted of a violation of 21 U.S.C. §846 and 21 U.S.C. §841(a)(1) under the first and fourth counts of the indictment, respectively. In addition, Rueda was convicted under

the second and third counts of a violation of 21 U.S.C. §924(c)(2) and 21 U.S.C. §841(a)(1). The trial court sentenced petitioners on June 27, 1979. Agapito received concurrent terms of five years imprisonment on each count and Special Parole for a period of three years. Calderon was sentenced to one-year imprisonment with credit for time served on the first count, a five-year prison term with execution suspended and placement on Probation for five years on the fourth count, and Special Parole for a period of three years. Rueda was sentenced to concurrent terms of seven years imprisonment on Counts One, Two and Four, a consecutive term of imprisonment of three years on Count Three, and to a term of Special Parole for a period of ten years.

The indictment was filed on March 1, 1979. The charges stemmed from confiscations by Drug Enforcement Administration agents. They seized a gun from Rueda at the time of his arrest and recovered cocaine in a hotel room and in an apartment in Manhattan. Count One charged Agapito, Calderon and Rueda with a conspiracy to violate the federal narcotics laws from February 5, 1979 to the date of filing of the indictment. Count Four accused all three of the petitioners of distribution and possession with intent to distribute approximately one kilogram of cocaine on February 22, 1979. The remaining counts addressed acts allegedly committed by Rueda alone on the same date. Count Two dealt with the distribution and possession with intent to distribute approximately eight kilograms of cocaine and Count Three concerned the carrying of a firearm during the commission of a felony.

Prior to trial a four-day hearing was held on petitioners' motion to suppress all evidence seized from (1) their persons, (2) room 1701 of the Sheraton-Americana Hotel and (3) apartment 3B at 328 East 85th Street and to suppress any and all statements made by them. The motion was denied on April 30, 1979.

On February 21, 1979 a DEA agent received an informant's tip that cocaine was stored in room 1701 of the Hotel Sheraton. The informant, in turn, had acquired this information from an

unidentified close friend. DEA agents stationed themselves in room 1702 and other parts of the hotel. By placing their ears against the connecting door with room 1701—occupied by Agapito and Calderon—they could overhear movement and some conversations. Unless they put their ears against the door, the agents could not discern what was being said on the other side. They saw Agapito and Calderon through the open door in the room and followed Calderon to the lobby, where she made a telephone call. The next day Rueda came to room 1701 with a shoulder bag and an attache case. When he left the agents arrested him and recovered a loaded gun.

At DEA headquarters Rueda admitted that he had brought cocaine into room 1701, but later retracted this statement. Thereafter, Agapito and Calderon left the room with an attache case, similar to the case carried earlier that day by Rueda. They were placed under arrest and $29,000 was found in the attache case. The agents entered room 1701 with Agapito and Calderon in custody to "secure" it and remained there until after 4:00 P.M. the next day.

While in room 1701 a female telephoned three times. Agent Forteza spoke with her in an undercover capacity, learned her address and agreed to meet her there. At the apartment the agents entered, searched the premises with the consent of the female occupant—Ligia Atehortua—and recovered cocaine, money and drug paraphernalia.

The agents and Ligia Atehortua went to room 1701 where she spent the night. A suitcase in the room was removed unopened to room 1702, which had a connecting door to 1701. The next day at 4:00 P.M. Agent Aponte obtained a search warrant for room 1701 and the suitcase and a shoulder bag located therein. He telephoned this news to the agents at the hotel. Upon opening the suitcase, they found cocaine.

REASONS FOR ALLOWING THE WRIT

1. *The Effect of the Illegal Entry and Seizure Prior to the Obtaining of a Search Warrant Question.*

This court has not decided what effect the illegal entry into premises and the improper seizure of a suitcase therein have upon the admissibility at trial of contraband found in the suitcase after the securing of a warrant.

The Court of Appeals held that the entry into petitioners' hotel room could not "be justified as a security check and was illegal" (slip op. 1707). Nevertheless, that Court concluded that "[a]lthough the agents seized the suitcase in Room 1701 which contained the cocaine, they did not open it until after the warrant had been obtained. The one kilogram of cocaine, therefore, was admissible if the warrant was valid. *United States v. Christophe,* supra, 470 F.2d at 869" (slip op. 1709). Our research discloses no federal case or statutory law supporting this holding. The Second Circuit in *United States v. Christophe,* (470 F.2d 865, 869 [2d Cir. 1972], *cert. den.* 411 U.S. 964 [1973] permitted federal agents "to conduct a cursory examination of the premises to see if anyone else was present who might threaten their safety or destroy evidence." In that case, however, the defendant was lawfully arrested in his house; a multi-room dwelling, rather than a single room was involved; and the heroin was discovered in the garage following a full scale search after the warrant was obtained three hours later. Here, the petitioners were arrested outside the hotel and in the lobby seventeen floors below; the agents entered the premises illegally; after determining that third persons were not present, the agents remained almost twenty-four hours; a suitcase (later found to contain cocaine) was seized and confiscated and taken from Room 1701 to Room 1702; the agents looked in the closets and into a shoulder bag left by Rueda in the room; telephone calls were intercepted; a civilian was brought into the room; she and the agents used it for overnight sleeping quarters; and the

warrant was not obtained until twenty-four hours later. "In short, they moved in" (slip op. 1706). The entry was illegal, the moving in for twenty-four hours was illegal and the seizure of the suitcase containing cocaine was illegal. The agents' actions constituted an unconstitutional deprivation of petitioners' rights and a substantial invasion of privacy. No illegality took place in *Christophe*—the only authority cited by the Court of Appeals.

In *State v. Matsen* (287 Or. 581, 601 P.2d 784 [1979]) the Supreme Court of Oregon addressed the identical issue set forth here. The police in *Masten,* armed with probable cause, but without a warrant, entered a residence and " 'froze the premises' " (601 P.2d at 786). Thereafter a search warrant was obtained and executed three and one-half hours later. A complete search of the residence pursuant thereto uncovered the evidence used against the defendants at trial. The Oregon court decided that "the subsequent securing of a search warrant does not affect the validity of the original warrantless entry" (*Ibid.* 788). Accordingly, it suppressed the evidence seized, although it was not a fruit of the illegal act (*cf. United States v. Picariello,* 568 F.2d 222, 225 [1st Cir. 1978]). The Supreme Courts of Washington and California had previously adopted the rationale of the Oregon tribunal (*State v. Bean,* 89 Wash. 2d 467, 572 P.2d 1102, 1105 [1978]; *People v. Shuey,* 13 Cal. 3d 835, 850, 120 Cal. Rptr. 83, 94, 533 P.2d 211, 222 [1975]; but see *People v Barndt,* 604 P.2d 1173, 1175-1176 [Colo. 1980]; *State v Smith,* 112 Ariz. 531, 544 P.2d 213, 216 [1975]).

This Court has distinguished between the seizure and the search of luggage—most notably when discussing the automobile exception. However, the controlling factor present in such cases, but absent here, is the propriety of the initial seizure (*Arkansas v. Sanders,* U.S., 99 S.Ct. 2586, [1979]; *United States v. Chadwick,* 433 U.S. 1 [1977]). This Court did not address the situation where the initial police action was illegal. It is respectfully urged that a constitutionally prohibited entry and search of a dwelling mandates the suppression of any

contraband ultimately found therein. The illegal seizure of the suitcase, whether or not it was opened, intruded greatly upon the petitioners' privacy. Our research has uncovered no judicial authority artificially dichotomizing a seizure in order to render the container illegally seized, but finding the contents, nevertheless, admissible at trial.

The Court of Appeals ruling herein undermines the exclusionary rule. It affords no protection to anyone from unconstitutional police conduct, so long as ultimately a warrant is secured. Thus, the police can break in, move in, intercept telephone calls and commit the greatest invasions of privacy imaginable, including sleeping in a citizen's bed, eating at his table and using his personal belongings, without fearing the suppression of contraband found therein, provided that they eventually, at their leisure, obtain a warrant. Even judicial approval in the form of a search warrant issued by a neutral magistrate does not countenance the invasion which took place here. If this Court allows the decision in the instant case to stand, no effective redress or future bar to this constitutionally repugnant police behavior will exist.

This case presents the Court with the opportunity to decide if an illegal search of a room and seizure of a suitcase therein require the suppression of contraband eventually found in the suitcase after the issuance of a search warrant based upon probable cause.

2. *The Probable Cause for the Search Warrant Question.*

After holding the entry into petitioners' hotel room illegal, the Court of Appeals sustained the search warrant, because "[t]wo untainted portions of the affidavit contain a sufficient showing of probable cause to render the warrant valid" (slip op. 1709). The Court below relied upon "Rueda's confession that he had delivered cocaine to Room 1701" and the "information furnished by Mr. X, which was corroborated by the agents' own observations" (*Ibid.*)*

* The affidavit in support of the search warrant is reproduced in Appendix D.

A. *The Severability of the warrant*

In excising the tainted portions of the affidavit to determine if the remainder provides probable cause, the Court of Appeals relied upon Mr. Justice Powell's concurring opinion in *United States v. Giordano* (416 U.S. 505, 554-556 [1974]) and a number of federal decisions. However, this Court has not yet decided the propriety of this procedure and whether the exclusionary rule should be so limited.

B. *The suitcase*

From the affidavit and the testimony at the hearing it became clear that the agents learned of the existence of the suitcase by illegally entering the room and viewing it there. Since without the illegal actions of the police the suitcase would not have been included among the places to be searched, its contents should be suppressed (*Wong Sun v. United States,* 371 U.S. 471 [1963]; *People v. Williams,* 192 Colo. 249, 557 P.2d 399, 405 [1976]).

C. *Rueda's confession*

The statement by Rueda as it appears in the affidavit in support of the search warrant is tainted, unreliable and misleading. The admission was obtained as a direct result of the exploitation of Rueda's illegal arrest and, accordingly, is tainted.* (*Brown v. Illinois,* 422 U.S. 590 [1975]; *Wong Sun v. United States,* 371 U.S. 471 [1963]).

The testimony at the suppression hearing showed that Rueda had recanted the statement immediately after having made it. His confession was the subject of much controversy and many inconsistencies in the District Court.**

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* The lack of probable cause for Rueda's arrest is discussed in Reason 4, *infra.*

** The court stated that it was unimpressed with Agent Torres' testimony (Rueda allegedly confessed to her) and found it difficult to elicit testimony about an event less than seven weeks old.

Most important of all, the statement misled the magistrate. While the affiant is not required to include all known information in his application for a warrant, the bare averment that Rueda made an admission deceived the magistrate and prevented him from accurately assessing the information before him. Had the magistrate known of some of the circumstances surrounding the statement in question, he might well have given it little or no weight. This case affords this Court the opportunity to decide the extent of the duty of the police and prosecutor to disclose exculpatory information to a neutral magistrate. Unless such data is forthcoming, the magistrate may find probable cause when none exists.

D. *The information*

In paragraph 2(a) of the affidavit the informant describes the source of his information merely as a "close friend." While double hearsay is acceptable, it is necessary that "both levels of hearsay meet the two-pronged test spelled out in *Aguilar*" (*United States v. Connolly,* 479 F.2d 930, 941 [7th Cir.] *cert. dism.* 414 U.S. 897 [1973]; *United States v. Jenkins,* 525 F.2d 819, 823 [6th Cir. 1975]; *United States v. DiNovo,* 523 F.2d 197, 200 [7th Cir.], *cert. den.* 423 U.S. 1016 [1975]; *United States v. Kleve,* 465 F.2d 187, 192 [8th Cir. 1972]). Here, no further information concerning the "close friend" is contained in the affidavit. "Narcotics informants do not enjoy a reputation for veracity" (*Von Utter v. Tulloch,* 426 F.2d 1, 3 [1st Cir.], *cert. den.* 400 U.S. 826 [1970]). Therefore, the affidavit fails to furnish a basis for finding the "close friend" credible and is deficient.

According to the affidavit, the "close friend" told the informant that "he had been inside Room 1071 at the Sheraton-Americana Hotel, 810 Seventh Avenue, New York, New York and had seen there approximately four kilograms of cocaine and, further, that the room was occupied by a man and a woman named Martha." While personal observations are a reliable source of information, here the recitation in the af-

fidavit is fatally lacking in specificity. For example, the time and date of observations, a description of the room's occupants, the reason for the belief that the cocaine was still in the room, the basis upon which the friend concluded he was viewing cocaine, how the cocaine was packaged and where it was stored were not noted in the affidavit. No allegation was made that the informant or his friend feared for their life or safety (*United States v. Harris,* 403 U.S. 573, 583, [1971]); and a statement that one has seen cocaine can hardly be considered a declaration against penal interest. "This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar" (*Spinelli v. United States,* 393 U.S. 410, 417 (1969) and did not enable the magistrate to "know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation" (393 U.S. at 416).

Paragraphs 2(b) to (k) recount observations of DEA agents from their arrival at the hotel until the arrest of Agapito and Calderon. In sum, they state that the agents confirmed that a female named Martha and a male occupy Room 1701; that she left on two occasions and he never left the room prior to their arrest; that overheard conversations indicated that someone was expected on February 22, 1979; that at 12:30 P.M. someone in Room 1701 stated, "I am in 1701 come on down;" that Rueda arrived with a shoulder bag and a small boy; that thereafter the agents "heard sounds of a ripping and a shuffling, suggesting the tearing of tape and/or the counting of money;" that Rueda left without the shoulder bag and was in possession of a loaded gun when arrested; that Rueda stated that he had brought cocaine into Room 1701; that Agapito and Calderon were arrested while the former was carrying an attache case containing $29,000.*

* The lack of probable cause for Agapito's arrest is discussed in Reason 4, *infra.*

From the above recitation we submit that the only aspect of the information corroborated in the affidavit is that Room 1701 was occupied by a male and a female named Martha. Petitioners' conduct was unremarkable and wholly innocent in appearance. In fact it was inconsistent with the agents' expectations, as established at the hearing, that Rueda had come to pick up cocaine; for he arrived with a shoulder bag and left empty-handed.

In sum, after excising the "untainted portions of the affidavit," the informant and his information are unreliable and the agents' observations are insufficient corroboration to furnish probable cause.

3. *The Overhearing of Petitioners' Conversations Question*

The Court of Appeals found that the agents did not violate the Fourth Amendment by pressing their ears to the connecting hotel room door. It did not specifically address the issue of whether the door constitutes a "mechanical device" under 18 U.S.C. §2510(5). It held "that the expectation of privacy asserted by appellants here is not reasonable" and relied "upon three critical factors" (slip op. 1690). Petitioners respectfully submit that by closing the door to their room and speaking in Spanish and in a normal tone, they relied upon a privacy which the Government violated (see *Katz v. United States*) 389 U.S. 347 [1969]).

The Second Circuit stated:

> "First, appellants' conversations were heard by the *naked human ear.* Regardless of whether the tones may be described as loud or normal, the fact remains that appellants were talking *loud enough* [emphasis in original] to be heard by others in an adjoining room. The agents were unaided by any artificial, mechanical or electronic device" (slip op. 1691).

The testimony at the suppression hearing established that the agents could not distinguish words and that a defense witness could not understand even a shout from the next room, unless their ears were pressed against the door. Petitioners urge that they reasonably expected privacy and that the door thus served as a "mechanical device." This Court has not considered the propriety of such eavesdropping.

Next, the Court of Appeals reasoned: "Second, the agents had a legal right to be in the adjoining room" (*Ibid.*). As the Court later noted, "the absence of a trespass" is not a "controlling factor" (*Ibid.* 1692). The cases cited and followed by the Court refused to "divide the listening room into privileged or burdened areas" (*Ibid.* at 1691; *United States v Fisch,* 474 F.2d 1071, 1077 [9th Cir.], *cert. den.* 412 U.S. 921 [1973]; *United States v. Jackson,* 588 F.2d 1046, 1054 [5th Cir. 1978], *cert. den.* U.S., 99 S.Ct. 2882 [1979]). However, in those cases the courts did not consider the effect of the Omnibus Crime Control and Safe Streets Act of 1968.

Finally, the Court of Appeals noted: "Third, appellants were in a hotel room" (slip op. 1693). Of course, some people live permanently in a hotel, while others spend a good part of their lives there. A hotel room is no different than rented space in a rooming house or an apartment. Professor Anthony G. Amsterdam of Stanford Law School observed:

> "But if you live in a cheap hotel or in a ghetto flat, your neighbors can hear you breathing quietly even in temperate weather when it is possible to keep the window and the doors closed. For the tenement dweller, the difference between observation by neighbors and visitors who ordinarily use the common hallways and observations by policemen who come into the hallways to 'check up' or 'look around' is the difference between all the privacy that his condition allows and none. Is that small difference too unimportant to claim fourth amendment protection?" (Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 404 [1974]).

This reasoning applies equally well here. Even a transient at a hotel has an "expectation of privacy."

In sum, this case presents this Court with the opportunity to rule on a novel question of law.

4. *The Probable Cause to Arrest Question*

A. *Rueda*

The information available to the agents when they placed petitioners under arrest is set forth under Reason 2, *supra.* With respect to Rueda, the agents had not seen or heard him commit a single suspicious act before placing him under arrest in the hotel lobby. He had merely gone to a hotel room with a small boy and left without an attache case and shoulder bag. The agents, based upon their tip, had anticipated the arrival of someone to pick up cocaine. It was, therefore, highly improbable that Rueda had violated the law when he left without a package. Presumably, he was arrested for conspiracy; however, mere presence, even at the scene of a crime does not constitute probable cause to arrest for conspiracy (*United States v. DiRe,* 332 U.S. 581 [1948]). To hold otherwise would be to go against the grain of the Constitution and this Court's prior rulings (*cf. Ybarra v. Illinois,* U.S., 100 S.Ct. 338 [1979]).

B. *Agapito and Calderon*

Agapito and Calderon were arrested as a result of a double hearsay tip, minimum corroboration of innocent aspects of the information furnished and Rueda's dubious admission following his arrest.* Assuming that this Court accepts petitioners' contentions concerning the absence of probable cause to arrest Rueda and the standing of the remaining petitioners to assert that claim, no probable cause can be found. The observations of the agents, coupled with double hearsay information from an isolated informant never in direct contact with the agents, did not permit them to arrest Agapito and Calderon.

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* A discussion of the standing issue is contained in Reason 5, *infra.*

5. *The Standing Question*

In the District Court the prosecutor maintained that Agapito and Calderon lacked standing to contest the validity of Rueda's arrest. Similarly, he contended that Rueda could not complain about the arrests of Agapito and Calderon and any unlawful invasion of the hotel room or the seizure in Atehortua's apartment. This argument, if accepted, completely sterilizes the exclusionary rule and invites unconstitutional police tactics.

The petitioners suggest that the sole purpose of Rueda's arrest was to build a case against Agapito and Calderon without risking the suppression of evidence because of an illegal arrest and search. Mr. Justice Douglas concurring in *Gelbard v. United States* (408 U.S. 411 [1972]), eloquently stated:

> "We are told that police are often tempted to make illegal searches during the investigations of a large conspiracy. Once the police have established that several individuals are involved, they may deem it worthwhile to violate the Constitutional rights of one member of the conspiracy (particularly a minor member) in order to obtain evidence for use against others" (*Ibid.* at 67).

Rueda was an unknown person whose conduct did not indicate that he had contraband on him. The agents were seeking to gather evidence to support the arrest of Agapito and Calderon and the search of their room. Therefore, the agents sacrificed nothing, from their point of view, in building their case, when they took Rueda into custody.

The actions of the DEA agents consist of a well-coordinated series of distasteful and/or illegal acts. For twenty-two hours they listened to every sound coming from Room 1701. Without probable cause they arrested Rueda and obtained an alleged admission, subsequently recanted. Instead of relying upon normal investigative techniques, they arrested Agapito

and Calderon and invaded their hotel room. Without a warrant they remained in Room 1701 for twenty-four hours, took a suitcase, later found to contain cocaine, out of the room and intercepted incoming telephone calls. They obtained consent to search, reduced to writing two hours later, from a lady whose child they held. This woman, not arrested, was then safeguarded in the hotel room from which the unopened suitcase had been removed, also for "safekeeping." Now the Government desires to avoid implementation of the exclusionary rule because it violated A's rights to obtain evidence against B and then violated B's rights to gather evidence against A. In addition, the petitioners' grievance rests upon the use of illegally obtained evidence not just to convict, but to deprive them of their Fourth Amendment rights. No case uncovered in our research dealt with this issue where the motive for violating A's rights *a priori* was to obtain evidence against B.

In *Rakas v. Illinois* (439 U.S. 128 [1978]) this Court held that two passengers in an automobile could not challenge the introduction into evidence of a sawed-off rifle and shells seized during a search of the car, where neither the car, the rifle nor the shells belonged to them. The crucial difference between *Rakas* and the case at bar is the presence here of a motive to arrest A to gather evidence against B. It is this vice for which the exclusionary rule is needed. Moreover, in the case before this Court, the arrests were removed in time and place from the illegal acts (see also *United States v. Tane,* 329 F.2d 848, 852-853 [2d Cir. 1964]).

Petitioners request that this Court modify the exclusionary rule to prevent the abuses committed herein by applying it to situations of willful constitutional violations, regardless of standing, or by broadening it "for its deterrent effect, disregarding nice questions of standing with respect to the particular defendant who moves to suppress," because "the victim of the illegality is the judicial process itself" (*Shuey v. Superior Court,* 30 Cal. App. 3d 535, 542 106 Cal. Rptr. 452, 457 [1973]).

6. *The Conduct of the Trial Judge Question*

The trial developed into a conflict between the Trial Judge and defense counsel for petitioner Rueda. The spill over effects also deprived Agapito and Calderon of a fair trial.

The record contains literally well over one hundred instances in which the trial judge either "instructed" defense counsel, belittled the defense case, accused the defense attorneys of wasting time by their objections and cross-examination, called defense objections ploys to keep out unfavorable evidence, impaired the examination of witnesses, bolstered the Government's witnesses or praised the prosecutor. The trial judge further failed to adequately handle an incident of possible jury misconduct and the jury's exposure to the fact that the defendants were in custody. Various examples are cited below. A reading of even the cold record as a whole leaves the distinct impression that counsel for petitioners could only have been intimiated and the jury influenced by the conduct of the court.

When defense counsel for Rueda objected to a claimed misstatement of the evidence in the prosecutor's rebuttal summation, the trial judge scolded him:

> "THE COURT: Objection overruled. Sit down and stop interrupting unnecessarily and without real foundation. It wasn't done to you while you were going forward" (A. 319).*

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* References are designated as follows: "A"—Appendix in the Court of Appeals; "Tr."—Trial commenced on May 9, 1979 and concluded on May 23, 1979.

Defense counsel objected seven times during the rebuttal summation. Five of these objections form the basis for Reason 7, *infra*, dealing with prosecutorial misconduct (A. 313, 314, 322, 323, 325). The remaining two objections, for drawing improper inferences from facts not in evidence and for misstating the evidence, were not frivolous (A. 316, 391). The prosecutor was interrupted five times during his summation (Tr. 1470, 1472, 1484, 1485, 1486) and, in turn, objected six times during Mr. Sutton's closing argument (Tr. 1509, 1510, 1512, 1514, 1519, 1523) and two times when Mr. Sussman summed up (Tr. 1548, 1555).

Following defense objections to two statements by the prosecutor that the defense can hire a chemist, the judge rebuked the attorney:

"THE COURT: According to you, but not according to the judge. Please do not interrupt, and sit down" (A. 322).

* * *

"THE COURT: Will you sit down? I don't know whether you are purposely trying to prevent the government from completing or what your purpose is, but those are idle, senseless objections, and you will please curtail them" (A. 323).

In ruling upon defense objections, the judge admonished:

"THE COURT: . . . No technicalities are going to interfere with the doing of justice in my court . . . " (A. 208).

* * *

"THE COURT: You have made it. It is ineffective. It is almost surplussage, and in my opinion has absolutely no weight . . . " (A. 238).

* * *

"THE COURT: Get back. Get back. I know. I know. You just do not—you are not particularly pleased with what the Court is endeavoring to accomplish" (A. 246).

* * *

"THE COURT: . . . You may not like it, but that's his answer, and I see no sense in pursuing the same thing. Go to something else" (A. 247).

* * *

"THE COURT: What you are trying to do is prevent me from reading what you think or you believe will not be helpful and I intend to do everything I said I would do" (A. 286).

The trial judge often overruled objections or argument by telling defense counsel to sit down or stand back. (A. 77-78, 86,

160, 173, 174, 191, 226, 236, 314). At one point, with an immeasurable chilling effect on other counsel, the judge ordered the marshal to come forward and see that Mr. Sutton sat down whenever the court instructed him to do so (A. 273-274). The judge called upon the marshal to put counsel in his seat several times (A. 168, 284, 286). When an objection was voiced by co-counsel to the continued presence of the marshal at the defense table, the judge retorted, "If the lawyer does not respond I intend to have the marshal do it. If you don't, I will do the same with you" (A. 287).

Throughout the trial the court personally rebuked defense counsel, as demonstrated by the following excerpts:

> "THE COURT: . . . Your voice is loud and raucous. Please keep it down. It gets wearisome when you keep screaming" (A. 239-240).
>
> * * *
>
> "THE COURT: Wait a minute. The judge asked a question whether you like it or not. When I ask a question, you remain quiet, sir" (A. 80).
>
> * * *
>
> "THE COURT: I got your point. You overdo it all the time. I got your point" (A. 182).
>
> * * *
>
> "THE COURT: Now look here, sir. You know full well that he doesn't and you know full well from your experience that all he can tell us is when he got it for the purposes of analyzing it. That question is absurd, unwarranted and silly" (A. 264).*

At other times the court accused Rueda's attorney of wasting time, thereby suggesting that the objections were fruitless or the cross-examination ineffective; for example: "We are not playing a game here. Let's proceed" (A. 204); "I want to give you ample opportunity, but if you are going to get into a

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* The prosecution had voiced no objection to the question which provoked this outburst.

microscopic situation here and waste our time I will halt you . . . Cut out the microscopic stuff" (A. 209); "The meticulousness has got to stop. We will be here for another week" (A. 212); "I don't care what you think. Just remain quiet while I am talking. You don't like it, but I want it on the record, and I want to show that you are wasting time" (A. 249); "Oh, for goodness sake. Come on, will you, sir?" (A. 262). The ultimate blow came near the beginning of Mr. Sutton's summation when the court commented: "I wish you would get down to the evidence in the cse counsel" (Tr. 1510).

Even more disturbing than the above disparaging remarks were the repeated innuendos and outright appearances that the defense attorneys sought to deceive the jury: "Wait a minute. You know that you slipped on that one, so you are rushing me. You had his attention called to the time, and he was answering you as to the time" (A. 184); "Sir, you won't get anywhere that way. I heard you about 13 [Exhibit 13] and then you pushed 14 in" (A. 186-187); "No, that's just a smart move, sir" (A. 192); "Show him the whole thing or I am going to show it to him . . . . But you were not doing it that way, and you know full well you weren't" (A. 193-195); "Wait a minute. You have done that entirely too often and I have cautioned you about it" (A. 196); "You don't want me to think that you are trying to trap him, do you?" (A. 211); "I won't let you continue to do it that way. You are notorious for doing it that way" (A. 213); "Now, come on, Mister. I know exactly what you are doing . . . . Don't waste time. Don't waste time. You already have a copy. You know what it is. Don't turn those pages as though you never saw it before . . . . I don't care what you think. Now you go ahead and get through with it so we can proceed with the trial and don't purposely waste time" (A. 225); "If the other side had said that you would say he is making himself an expert witness" (A. 241); "Do you seriously contend that when a manual is distributed to those who do the work of this witness that they are then to make a study before they use it

of the authors who compiled it?" (A. 244)*; "Actually what Mr. Sutton was objecting to he himself did. He brought in an entirely different case" (A. 275); "You were the one who knew full well that this witness had told us the name Jaime when he testified before me. You did not reveal that yourself" (A. 276); "Your obligation as a lawyer is to deal straight forward with the judge" (A. 281-282). Other verbal exchanges between the judge and defense counsel appear throughout the trial record (e.g., A. 81-82, 188-189, 217-218, 234-235, 276-280, 293-294). Finally, the judge expressed open disbelief in Mr. Sutton's statement that he had requested the prosecutor to produce a press in court and told the jury that in his presence Mr. Sutton "merely said he wanted to see it" (A. 305-306). Actually, he had said outside the jury's presence: "When we see it we might decide to have it put in, your Honor. We will discuss it" (A. 300-302).

Motions for a mistrial based upon the appearance of bias on the part of the judge were denied (A. 165-166, 282). Another motion for a mistrial was greeted with a verbal lashing (A. 170), an objection to the prosecutor's screaming was excused as a natural reaction to defense counsel (A. 245), and an objection to the court's yelling at co-counsel resulted in the attorney being reprimanded (A. 168-169).

The above constitutes but part of the prejudicial aspects of the trial. The cumulative effect of just this portion was a strained atmosphere which "could not have helped but prejudice the jury" (*United States v. Persico*, 305 F.2d 534, 537 [2d Cir. 1962]; see *United States v. Dellinger*, 472 F.2d 340, 386 [7th Cir. 1972]). True, the court was careful to give instructions that it had no opinion and that the attorneys had a right and duty to fight (see e.g., A. 123-126, 335-336, 337-338, 344-345). However, these remarks pale against the comments made and

* This remark was part of a continuous attempt by the court to aid the chemist. Through cross-examination, defense counsel sought to attack the basis for the chemist's conclusions. Accordingly, he inquired about the manual upon which the chemist relied. The court's comments destroyed this line of interrogation, as noted, *infra*.

conduct displayed throughout the trial and cannot undo the prejudice. The jury could only conclude that the judge knew the law, but, in spite of his instructions, did express his opinion on the evidence. The only remedy is reversal (*United States v. Nazzaro,* 472 F.2d 302, 312-313 [2d Cir. 1973]).

In *United States v. Boatner* (478 F.2d 737, 740 [2d Cir. 1973] the Court of Appeals warned the same trial judge that "There may be a point, however, when hostility between court

In *United States v. Boatner* (478 F.2d 737, 740 [2d Cir. 1973] the Court of Appeals warned the same trial judge that "There may be a point, however, when hostility between court and defense counsel alone creates the kind of embattled and prejudicial atmosphere in the courtroom that makes a fair trial impossible." Unfortunately, whether egged on or not by Rueda's attorney's behavior, the judge prevented the petitioners from receiving a fair trial. Here, we have much more than "the few brief incidents" in *Boatner (id.* at 741). Moreover, "if defense counsel acted improperly they should be dealt with by sharp reprimand outside of the hearing of the jury or if necessry by use of the contempt power" (*United States v. Persico, supra* at 540; *United States v. Grunberger,* 431 F.2d 1062, 1068 [2d Cir. 1970]; *United States v. Coke,* 339 F.2d 183, 185 [2d Cir. 1964]; *United States v. DeSisto,* 289 F.2d 833, 835 [2d Cir. 1961]).

The court took a big role in the examination of witnesses. Judicial interruptions permeate the record. Sometimes the judge took over or restricted cross-examination (A. 193-195, 197-201, 297-299, 303-304). When the chemist was questioned by the defense, the court's questioning increased (A. 239-269). Coupled with the excessive judicial participation during the cross-examination of the chemist were repeated attempts to bolster his testimony as follows: "Just sit down [Mr. Sutton]. The government will clear that up" (A. 226); "You must not let the interruptions affect you. You just stick to your testimony, do you understand?" (A. 227); "I know you said it, but I want to be

sure that there isn't evey a shadow about it" (A. 237).*

Throughout the trial the court's comments enhanced the Government's witnesses or excused their memory lapses (A. 97-98, 106-107, 192A, 251, 255-258, 268). In fact, the judge observed, "I am going to give the government an opportunity to clear up whatever impressions were left as a result of the cross" (A. 266) and "You can clear that up, Mr. Livingston (A. 190). Motions for a mistrial and objections to the court's open assistance to the prosecutor were rejected (A. 98-99, 108-109, 111-116, 162-164, 170-171).

The judge also recognized the constant friction between himself and counsel. Twice he reprimanded counsel in private (A. 176-179, 288-292). However, he chose to upbraid defense counsel in front of the jury for what he deemed the needless consumption of time in cross-examination by reading from and then expanding upon the Federal Rules of Evidence (A. 202-203). On the other hand, the court, from time to time, praised the Assistant United States Attorney: "I'm sorry to interrupt you. Did Mr. Livingston at any time directly or indirectly tell you to testify to anything other than what you knew to be the truth" (A. 84); "He [Assistant United States Attorney] has an obligation to see that it is removed. If he doesn't he violates his position. I don't think he would dare do that" (A. 159); "I feel that the deportment of the United States Attorney was exemplary under the circumstances" (A. 298).

Defense counsel objected to the prosecutor stating that certain requested reports had already been turned over to him. The

* Whether the tested substances contained cocaine was a contested issue. The court took the wind out of the defense sails by its conduct during the examination of the chemist. The prosecutor sprung a leak in the boat by saying if the defense claims were serious they could hire a chemist (see Point Three, *infra*). The court sunk the ship by charging, "Although there seems to be little dispute as to this, you must, however, still find beyond a reasonable doubt that the substance contained in the government's exhibits in evidence is cocaine" (A. 393). A defense exception to the reference to "little dispute" was rebuffed (A. 429-430).

judge intervened by noting, in part, "The jury does not know until it is told that the government has furnished each counsel with a great deal of material in advance of trial, some of it that the government was not compelled to produce at all" and continuing to defend the prosecutor (A. 223-224). Later, the court repeated that the prosecutor gave more than the law requires (A. 296).

The continuing comments of the trial judge require reversal (*United States v. Nazzaro, supra* at 310; *United States v. Grunberger, supra* at 1067; *United States v. Coke, supra* at 185; *United States v. DeSisto, supra* at 834-835). The turning over of Jencks Act material should not be commented upon (see *United States v. Guglielmini,* 384 F.2d 602, 605 [2d Cir. 1967]; *Johnson v. United States,* 347 F.2d 803, 805 [2d Cir. 1965]) and bolsters the credibility of the witnesses, if not used to impeach them.

Three prejudicial incidents involving the jury occurred during the trial. Each time the court's remedy was inadequate. Counsel for Calderon notified the court that he had observed the petitioners in handcuffs with the marshals in the presence of the jury. The judge questioned the marshals, who acknowledged the incident, but denied that the petitioners were in handcuffs. No further action was taken (A. 117-122). Even if no handcuffs were seen, the effect was the same, since the jurors undoubtedly knew the identity of the marshals from having seen them in court when they were summoned by the judge to place Mr. Sutton in his seat. The inherent prejudice of being seen in custody was not rebutted, because no remedial action was taken. In both *United States v. Taylor* (562 F.2d 1345, 1359 [2d Cir. 1977]) and *United States v. Torres* (519 F.2d 723, 727 [2d Cir. 1975]) the court questioned the jurors and minimized any possible harm. Here, the situation was aggravated by the judge's insistence upon being seen on the bench at 9:00 A.M., whether or not the petitioners had been produced. When the possible prejudice to the petitioners as a result of this practice was raised (A. 129), the judge, in essence, answered that he considered it more important that the jury see him at 9 o'clock and

realize he did not keep them waiting than that the petitioners' incarceration be kept hidden from them (A. 147-149).

A more serious incident occurred later that day when the two interpreters overheard some jurors discuss the case and state that Mr. Sutton was trying to get the case thrown out on technicalities and was hoping for a mistrial (A. 127-137). The judge immediately contaminated the entire jury by relating the incident to them. Instead of conducting a voir dire in chambers of the jurors individually, the judge gave a long dissertation and merely asked each juror, "Do you get what I am saying?" or "Do you understand me?" (A. 137-146). A motion for a mistrial directed at the inadequacy of the court's instructions was denied (A. 150-155).

On the afternoon of the second day of deliberations a jury note required the reconvening of all parties and the jury. The judge read the note to the jury and gave supplemental instructions (A. 442-448). When the jury retired, defense counsel stated that the petitioners had not been present and moved for a mistrial. The judge angrily criticized the attorneys for not having brought the matter to his attention. The attorneys responded that they were afraid to interrupt the court, that they could not alert the court without calling attention to their clients' absence, and that they had moved for a mistrial. The exchange between the court and counsel reflects the tempo of the entire trial and shows how the judge's domination of the proceedings denied the petitioners a fair trial (A. 448-457). The effect of the jury not seeing the petitioners may have been devastating. Since the next time that the jury returned to court was to render its verdict, the jurors could well have concluded that the petitioners were in custody or had fled the jurisdiction.

In sum, the comments to defense counsel and on the evidence, coupled with the bolstering of the prosecutor and his witnesses, could only have conveyed the message that the judge thought the petitioners were guilty. The mishandling of the jury incidents aggravated the damage. Either set of circumstances alone would have severely prejudiced the petitioners. Together they denied them their due process right to a fair trial.

7. *The Prosecutorial Misconduct Question*

The defense attorneys argued at trial that the DEA agents had fabricated the charges which resulted in the arrests and prosecution of the petitioners. In summation they questioned the role of Ligia Atehortua and what she had received for her cooperation (Tr. 1558-1561). Additionally, they attempted to thoroughly cross examine the chemist (Tr. 1041-1124) and criticized his qualifications and findings in closing argument (Tr. 1536-1540).

In his rebuttal summation the prosecutor attacked defense counsel personally and blamed them for the dearth of information about Ligia, arguing (or testifying) as follows:

> "Ladies and gentlemen, I submit to you that the attorneys are making those arguments and are making improper arguments and that they know it in advance of making those arguments.
>
> "I submit to you, ladies and gentlemen, that if I had asked any agent 'What did Ligia Atehortua tell you, what did she say, just exactly what was her cooperation,' I submit to you that if I had asked those questions, you would have heard screams in this courtroom, 'Objection, injustice, the government is trying to convict these people on the basis of hearsay.'
>
> "Now they come in here and they criticize the government for not bringing out the very evidence that they would have objected to if we had tried to do it.
>
> "MR. SUTTON: Your Honor, I think that I—
>
> "THE COURT: Please sit down, sir" (A. 313-314).

The prosecutor continued:

> "MR. LIVINGSTON: And they tell you 'No apparent reason for making these arrests. No one saw Rueda commit a crime,' they say, and these lawyers know what the legal standards are for making an arrest, and they know that they are entitled to hearings before trial—

"MR. SUTTON: Objection.

"THE COURT: Overruled.

"MR. LIVINGSTON: —to determine whether or not there was reasonable basis for making the arrest and they know what information was elicited during the hearing prior to this trial as to what caused the agents to make this arrest, and they know whether there is evidence which cannot be brought into the trial for legal reasons. They know all about that, and yet they are arguing to you, ladies and gentlemen of the jury, no apparent reason for the arrest.

"I submit to you, ladies and gentlemen, that those are improper arguments to be made to you" (A. 314).

Immediately thereafter, the Assistant United States Attorney immediately stated "They are playing around further with legal concepts here" (*Ibid.*) and four times asserted "They know . . . " (A. 314-315).

A short time later in his rebuttal summation the prosecutor remarked, "of course, they can hire a chemist, too" (A. 321). An objection was overruled and defense counsel was told, "Please do not interrupt and sit down" (A. 322). The prosecutor repeated the offensive reference and the following occurred:

"It is the same way with respect to every single bag of white powder in this case. If they don't believe the chemist's infrared analysis was correct, they can hire a chemist, and that chemist can—

"THE COURT: Now what is it?

"MR. SUTTON: We have absolutely no burden of proof, your Honor—

"MR. LIVINGSTON: As I said, they don't have that burden of proof.

"THE COURT: Will you sit down. I don't know whether you are purposely trying to prevent the government from completing or what your purpose is, but those are idle, senseless objections, and you will please curtail them" (A. 322-323).

Finally, the prosecutor improperly responded to a defense argument of frame by informing the jury, "There are legal standards involved in making accusations. There are legal requirements that have to be met before you can bring a defendant to trial. You cannot accuse anyone you wish." Defense counsel again objected in vain (A. 325).

In the first excerpt quoted above, the prosecutor told the jury that the defense attorneys utilize objections to keep evidence from them and he knowingly sought to deceive the jury. The inevitable indirect suggestion was that counsel believes their clients are guilty and must resort to improprieties.

The references to knowingly made improper statements by defense counsel were often repeated when the prosecutor mentioned the pretrial hearing. In so doing he also conveyed the message to the jury that the judge had already passed with approval upon the credibility of the DEA agents and the propriety of the arrests.*

Two separate times the prosecutor maintained to the jury that the petitioners could hire a chemist.* These comments clearly conflicted with the petitioners' right not to submit evidence on their own behalf. Unlike the situation where a witness is available to both sides, here the prosecutor told the jury that if the defense attorneys truly doubted the findings and conclusions of the chemist, they would have had their own expert examine the suspected drugs (see *United States v. Lopez,*

* In his summation the prosecutor told the jury that the agents executed a search warrant in the hotel room and defense counsel objected (A. 307-308, 311). This statement, likewise, suggested that the court sanctioned the police work and bolstered the Government witnesses' credibility.

* The validity of the chemist's conclusions was a hotly contested issue. The error in summation was compounded by the trial judge's interference with cross-examination, his comments and his charge, as noted in Reason 6, *supra.*

584 F.2d 1175, 1178-1179 [2d Cir. 1978]; *United States v. Burse*, 531 F.2d 1151, 1154-1155 [2d Cir. 1976]). No instructions about the rights of a defendant not to testify or produce evidence can offset the effect of these court approved arguments. Instead of nipping the transgression in the bud, the court exacerbated the error by describing the objection in front of the jury as "idle" and "senseless" and warning defense counsel to curtail such interruptions (A. 323).

The prosecutor's allegations that certain legal standards must be met before an accusation can be made nullified other instructions by the court that an indictment is proof of nothing. The jury could only conclude that perhaps the indictment is insignificant, but, nevertheless, the DEA agents cannot "accuse anyone [they] wish" (A. 325).

Instead of giving prompt and effective curative instructions to dispel any prejudice, the lower court placed its imprimatur on the challenged remarks and chastised defense counsel for objecting in the first place. The case against petitioners was not overwhelming—considering the many inconsistencies in the testimony, the number of people who had access to the hotel room, including Ligia, and the absence of proof of actual possession or physical evidence corroborating the DEA agents' testimony—so that the cumulative effect of these errors, especially when considered with the conduct of the trial judge (see Reason 6, *supra*), mandates reversal (see *Berger v. United States*, 295 U.S. 78, 88-89 [1935]; *United States v. Drummond*, 481 F.2d 62, 64 [2d Cir. 1973]).

CONCLUSION

CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT BELOW REVERSED.

Respectfully submitted,

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Appendices

APPENDIX A
Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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79 Cr. 135 (IBC)

OPINION NO. 49154

UNITED STATES OF AMERICA,

-against-

CALIXTO AGAPITO, MARTHA CALDERON and HORACIO RUEDA,

Defendants.

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* * * * * * *

IRVING BEN COOPER, D.J.

The defendants Calixto Agapito, Martha Calderon and Horacio Rueda were arrested by agents of the Drug Enforcement Agency (DEA) on February 22nd, 1979. Defendant Rueda was charged with one count of conspiring to violate the Federal narcotics laws (Count 1), two counts of possession of cocaine with intent to distrtibute (Counts 2 and 4) and one count of possession of a firearm during the commission of a felony (Count 3). Defendants Agapito and Calderon were charged with one count of conspiracy (Count 1) and one count of possession

of cocaine with intewnt to distribute (Count 4).[1]

Prior to trial, defendants moved for suppression of evidence and dismissal of the indictment as being the result of illegal arrests, searches and seizures, and illegal investigatory tactics, in contravention of the Fourth, Fifth and Sixth Amendments of the Constitution of the United States.[2]

Facts

On the afternoon of February 21, 1979, an informant called DEA headquarters and spoke to Special Agent Victor Aponte, informing him, in substance, that a "close friend"[3] of the informant, identified by first name, had been in Room 1701 of the Sheraton-Centre Hotel at 810 Seventh Avenue in Manhattan where the friend hads seen and sampled approximately four kilograms of cocaine. The informant had, in the past, furnished similar information to the authorities from the same source and it had proven reliable. The informant himself was considered reliable by the DEA agents, for his information on several occasions lead to convictions and at least two search warrants which survived attack.

Agent Aponte testified that Mr. X had told the informant: he had been in Room 1701 before; the room was occupied by a Colombian man (later identified as the defendant Agapito) and a Cuban woman named Martha who came from Miami; Martha had been staying at the hotel for several days; and Martha and Agapito planned to leave New York by the weekend.

Special Agents Bell and Forteza were sent to the Sheraton, and confirmed with the hotel security personnel that Room 1701 was occupied by one Martha Calderon who hasd given a Miami address, had stayed in the room approximately one week, and had paid in cash at a double rate on a daily basis.

The agents obtained access to Room 1702 which adjoined Room 1701, a single locked door between. By pressing the nak-

ed ear against the crack of the adjoining door, the agents were able to overhear noises and parts of conversations emanating from Room 1701. The agents remained in Room 1702 and were joined by other agents who took turns with Bell and Forteza at pressing their ears against the door. They also maintained surveillance at the entry to Room 1701.

The agents testified to hearing many fragments of conversations between a man and a woman, and gathered that someone was to visit the room the next day, February 22, 1979. After a telephone conversation, the woman, later identified as Martha Calderon, was overheard to say in effect: "He is coming over about 11:00 a.m. tomorrow."

In mid-afternoon on February 22, 1979, DEA agents observed a male, later identified as Horacio Rueda, carrying a shoulder bag and an attache case, enter Room 1701, accompanied by a small boy. The only other activity in and out of Room 1701, since the agents commenced surveillance on February 21st, occurred when Martha Calderon left the room (followed by Agent Forteza), made a phone call in the lobby and returned; also when room service delivered food to the room.

From their position in Room 1702, the agents were able to hear greetings when Rueda entered Room 1701, conversation accompanied by ripping or tearing sounds as well as a shuffling sound, suggesting the tearing of tape and/or the counting of money. Agent Aponte heard one of the men say: "one-five-zero-zero-zero."

Soon after, Rueda left the room with the small boy, without the shoulder bag and attache case. Rueda was arrested by agents in the lobby of the hotel, searched in the DEA car outside the hotel and then taken to DEA headquarters. At the time of his arrest, he was carrying a loaded .22 caliber derringer.

After being advised of his rights at DEA headquarters, Rueda stated to a Spanish-speaking agent that he had just taken cocaine to the room. Rueda's statement was conveyed, by telephone, to the agents in Room 1702.

At approximately 4:00 p.m. on the afternoon of February 22nd, Agapito, carrying an attache case (apparently the same attache case Rueda had brought to the hotel room), and Martha Calderon left Room 1701. They were arrested just outside the hotel, the attache case was seized from Agapito, forced open, and found to contain $29,000 cash. Thereafter agents entered, secured and remained in Room 1701 in order to continue their investigation, apparently expecting additional phone calls relating to the sale of drugs would come there. They did not at that time search the room but opened the adjoining door to Room 1702 where Agapito and Calderon were temporarily detained.

At approximately 6:00 p.m. on February 22nd, the phone rang in Room 1701. Agent Forteza, a Spanish-speaking agent acting undercover, answered the phone. A female caller, later identified as Ligia Atehortua, inquired whether Horacio and her son hads been to the hotel room. Ligia called back twice more, and finally gave permission to Agent Forteza, posing as an associate of Agapito and Calderon, to come to her apartment, 3B, 328 East 85th Street, in New York City.

Upon their arrival at the apartment, Ligia admitted Agent Forteza, followed by other agents, into the apartment. Forteza identified himself as a DEA agent, and obtained Ligia's consent verbally and later in writing to search the apartment. When the agents entered Apt. 3B, bags of white powder were in plain view in the living room. The search turned up approximately eight kilograms of cocaine, several kilograms of isonicotinamide, a cutting agent, various other narcotics paraphernalia, also photographs of Horacio Rueda and the small boy who had accompanied him to Room 1701.

The next morning, February 23rd, upon the affidavit of Agent Aponte, the agents obtained a search warrant for Room 1701, which previously hads simply been occupied and secured. The affidavit contained much, but not all, of the information then known to the agents. The subsequent search of Room 1701 revealed one kilogram of cocaine in a suitcase with female clothing in it. The key to the suitcase was taken from Agapito at the time of his arrest.

The instant motions

Defendants base their motions to suppress on the issues of law to be discussed shortly, and on the following interpretations of the testimony adduced at the hearing.

1. Defendants claim that the Government failed to properly identify the source of its information—either the informant or h is so-called "friend," "Mr. X." It is implied that the agents either prevaricated or otherwise illegally obtained the information they had as to the identity and activities of these defendants, and that, in initiating their investigation, the informant's admitted lack of first-hand knowledge of the activities in Room 1701 operated to defeat or otherwise cast doubt on the validity of his information, so that all which followed was irrevocably tainted.

2. Defendants allege that, once ensconced in Room 1702, the agents illegally established, without a warrant, "an eavesdropping surveillance center to systematically overhear the private conversations of th eoccupants . . . of Room 1701." Defendant Rueda's Post-hearing Memorandum of Law, at 8-9. They claim that the agtents' method of putting their ears to the crack in the door adjoining Room 1701 amounts to a "mechanical" eavesdropping in violation of statutes requiring a warrant for such activity.

Defendants attack the credibility of the agents' testimony as to the snatches of conversation and noise they overheard between Agents Torres, Papantoniou, Aponte and the defendant Rueda, when he was brought to DEA headquarters following his arrest. The Government's testimony showed that Rueda told Agent Torres (they conversed in Spanish) that he had taken cocaine into Room 1701 and had demonstrated with his hands the size of the package delivered.

Defendants describe the testimony of the agents on this point as: "riddled with inconsistencies and contradictions, evasions, tailoring and fabrications." They argue that it is impossible to believe that Rueda, recently taken into custody "would

make a monumentally incriminating and suicidal statement that he delivered cocaine to the room."

While we did not find the testimony of the agents on this conversation a model of smoothness and consistency, we found their testimony, delivered in a convincing manner, credible and falling within the orbit of this court's experience in matters of this kind. We do not conclude, as defendants would have us do, that the agents fabricated this statement; rather, we view it as a link in the chain of evidence of probable cause supporting the contention that these defendants were engaged in criminal activity.[4]

Defendants raise many more objections to the conduct of the agents in the course of their investigation of the alleged crimes before us, going so far as to allege physical abuse of the defendants by the agents, a position we completely reject.

Issues of Law

The basic issues of law raised by defendants' pre- and post-hearing memoranda relate to the validity of the informant's tip as a basis for probable cause warranting arrest of the defendants, the securing of Room 1701 and its subsequent search pursuant to a warrant. There is also a challenge to the consent search conducted at Apartment 3B.

Additionally, the credibility of the agents and the nature of their investigatory tactics is severely impugned and prsented to this court as additional grounds for the suppression of evidence and dismissal of the indictment.

Standing. A threshold issue to be considered is whether the parties have standing to raise various alleged violations of their Constitutional rights, thus entitling them to suppression of the evidence gathered. Applicable to Rueda is the rule of automatic standing enunciated in *Jones v. U.S.*, 362 U.S. 257 (1960), where a defendant charged with possession is automatically granted standing to object to constitutional violations of the rights of co-defendants. Thus, Rueda is entitled to challenge the

legality of all the contested evidence—including, of course, his confession—and he has in fact done so. *U.S. v. Riquelmy,* 572 F.2d 947 (2d Cir. 1978); *U.S. v. Penco,* No. 198 (slip opinion) (2d Cir. September 6, 1979).

It is clear that the defendants Agapito and Calderon have standing to challenge the legality of their own arrests, and of the search and seizure of evidence found in Room 1701, in which they hads a legitimate expectation of privacy and a substantial interest. *Mancusi v. DeForte,* 392 U.S. 364 (1968). Additionally, being charged with possession of that evidence, they must have standing to contest its admissibility. *Jones v. U.S., supra.* However, Agapito and Calderon do not have standing to challenge the legality of Rueda's arrest and the search and seizure of evidence in Apt. 3B, under the holding in *Brown v. U.S.,* 411 U.S. 223, 229 (1973):

> There is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

The seizure of evidence, even if tainted as to one party due to illegalities, may not be contested by another party absent the criteria stated above; the "fruit of the poisonous tree" doctrine is not applicable to those whose *own* Fourth Amendment rights have not been violate.d *Wong Sun v. U.S.,* 371 U.S. 471 (1963); *U.S. v. Ceccolini,* 435 U.S. 268 (1978).

We observe that all three defendants have joined in the arguments presented in Rueda's behalf. Thus, the validity of the constitutional arguments raised as to all the evidence can be considered at one time, without reaching the issue of who has the standing to object to which items of evidence.

Arrests. Defendants contend that all three arrests were illegal in that they were made without probable cause. The stan-

dard to be applied, as defendants concede, is whether the arresting officer knows of sufficient facts and circumstances to justify his belief that a crime has been or is being committed. *Beck v. Ohio,* 379 U.S. 89 (1964). The defendants vigorously deny that the agents could have obtained any basis for such a belief from the informant's tip, from surveillance of the hotel room, or from Rueda's statement, either because the acquisition of that information was illegal or because it was completely fabricated by the agents.

We believe the Government has sustained its burden of showing that sufficient evidence was known to the agents to justify the arrests. "Probable cause to arrest exists when an officer has knowledge of facts and circumstances 'sufficient to warrant a prudent man in believing' that an offense is being or has been committed." *U.S. v. Rueda,* 549 F.2d 865, 870 (2d Cir. 1977); *Brinegar v. U.S.,* 338 U.S. 160 (1949).

Here, the agents acted upon a detailed tip provided by a reliable informant, substantial parts of wh ich their own independent investigation corroborated prior to any arrest. The fact that some of the corroborating information was susceptible of innocent interpretation does not undermine the validity of its use to establish probable cause. *U.S. v. Rodriguez,* 532 F.2d 834 (2d Cir. 1976). We say again, we found the total testimony of the agents convincing and determinative of the issues to which it was addressed.

There were sufficient circumstances surrounding Rueda's arrival at and departure from the room, in light of the prior comments and noises overheard by the agents during their survillance, to justify the belief that a crime had been or was being committed. Those circumstances justified the exigent arrest of Rueda immediately upon his departure from the hotel room. Rueda's subsequent admission that he had taken cocaine into the room afforded further substantial basis for the arrests of Agapito and Calderon.

The searches. Defendants claim that the agents' entry into Room 1701, following the arrests of Agapito and Calderon, was

illegal; and that the evidence and information obtained thereby, the cocaine found subsequent to the search warrant obtained the next day, and the calls which lead the agents to Apt. 3B and the discovery there of additional cocaine, all added up to tainted evidence. They argue that there was no legitimate basis for the agents' activities, that they hads no probable cause to believe that contraband was present, likely to be tampered with, and justifying their entry into the rom to secure it.

On the contrary, we find that, following the arrest of the defendants, the agents were justified in entering Room 1701 to protect against obvious risks. In the belief that narcotics, a highly disposable commodity, might be present in Room 1701 and that other persons might be inside, the agents acted properly in entering the room to secure it and prevent thhe destruction of evidence. *U.S. v. CAmpbell,* 581 F.2d (2d Cir. 1978). Their intrusion falls short of a search. The agents acted reasonably in protecting the evidence that they had probable cause to believe was present.

Additionally, the agents hads the belief or reasonable expectation that telephone calls would be made to the room by associates of the defendants in furtherance of their criminal activity. The paramount importance of continuing the investigation and possibly discovering the identrity of other membes of this conspiracy, further justified the presence of the agents in the room in order to intercept telephone calls. *U.S. v. Campbell, supra.*

Defendants argue that the search of Apt. 3B was unlawful because: (1) it was a fruit of the gents' earlier improper activities; and (2) Ligia's consent to the search was involuntary.

Assuming that the agents legitimately arrived at 328 East 85th Street, Apt. 3B, we must examine the circumstances of their entry and search of the premises. The Government's witnesses testified that after identifying themselves, they were admitted to the apartment by Ligia. They asked her permission to search, which she granted verbally and later by filling out and signing a consent to search form. According to the Govern-

ment's witnesses, Ligia cooperated voluntarily in their investigation during a period of several days, apparently being interested primarily in retrieving her son, the small boy who had accompanied Rueda to the hotel room, and who had been turned over by the agents (arresting Rueda) to the child welfare authorities.

Defendants allege that the agents intimidated Ligia, that her consent was merely a submission to authority, and that her signing of the form was coerced, thereby invalidating the evidence seized. *Johnson v. U.S.*, 333 U.S. 10 (1948); *U.S. v. Reed,* 572 F.2d 412 (2d Cir. 1978). Although Ligia was not available to testify at the hearing, here whereabouts being unknown, we examined with care the testimony and extensive cross-examination of the agents who searched the apartment and dealt with Ligia. We found no indication that Ligia's consent to the search was coerced. Accordingly, we hold that the search was unlawful and the evidence obtained properly before us. *U.S. v. Matlock,* 415 U.S. 164 (1974); *Schneckloth v. Bustamente,* 412 U.S. 218 (1973).

Room 1701, including the suitcase containing the cocaine, was searched by the agents on February 23rd, only after they obtained a search warrant from the Magistrate. The supporting affidavit was prepared by Agent Aponte; it afforded a more than adequate factual basis for the Magistrate's finding of probable cause sufficient to support the search warrant. The primary bases were the reliable informant's information as corroborated by the agents' own observations, and Rueda's post-arrest admission that he ahd taken cocaine into Room 1701. Additional impressive and convincing facts came to light: the discovery of cocaine at Apt. 3B, the fact that Rueda was carrying a loaded revolver and Agapito was carrying substantial amounts of cash when arrested.

Defendants contest the legality of the inclusion in evidence of the informant's tip, and Rueda's confession, under the authority of *Aguillar v. Texas,* 378 U.S. 108 (1964); *Spinelli v. U.S.*, 393 U.S. 410 (1969); *U.S. v. Karathonas,* 531 F.2d 26 (2d Cir. 1976); *Beck v. Ohio, supra;* and *Brown v. Illinois,* 422 U.S.

590 (1975). They insist that both factual items are fabrications of the DEA agents.

Informant's tip

There is a somewhat unusual issue posed by the fact that the informant's tip contained the personal observations of the informant's "close friend," referred to at the hearing as "Mr. X." However, the affidavit clearly recites the informant's previous reliability, supporting evidence of which was adduced at the hearing; further, that the informant had used the same source previously with results substantiating his reliability. Additionally, the affidavit recites how the informant came by his information, and provides sufficient underlying circumstances tending to corroborate the reliability and credibility of the information from "Mr. X." The crucial question is not "whether the affiant can attest to the reliability or credibility of the second individual, but whether the information furnished by the informant, taken as a whole in light of the underlying circumstances, can be said to be reliable." *U.S. v. Smith,* 462 F.2d 456, 460 (8th Cir. 1972), cited approvingly in *U.S. v. Fiorella,* 468 F.2d 688, 691 (2d Cir. 1972).

In this case, the manner in which "Mr. X" obtained his information carries its own indicia of reliability. He maintained his information was based on personal observations. Moreover, it can readily be inferred that "Mr. X" was either a witness to, or a participant in, a criminal narcotics transaction. His statements were thus in the nature of admissions against interest and therefore inherently reliable. *Spinelli v. U.S.,* 393 U.S. at 425. Another factor supporting the reliability of the information was the specificity regarding the identity and location of the suspects. This information is not of the type or detail that can be derived from "casual rumor." *Spinelli, id.* at 416.

The credibility of the hearsay information given to Agent Aponte by the informant may be established by corroboration of essential elements of the information, even elements which

otherwise appear to be innocent. *U.S. v. Gonzalez,* 555 F.2d 308 (2d Cir. 1977). The agents independently established the correctness of much of the informatioon given; their inquiry provided substantial corroboration of the information that significant narcotics activity was being conducted in Room 1701. *U.S. v. Harris,* 403 U.S. 573 (1971).

Consequently, we find that the credibility and reliability of the information given, along with the corroborative findings of the authorities, in and of themselves, sufficiently establish probable cause. *Aguilar v. Texas, supra; Spinelli v. U.S., supra; U.S. v. Dunloy,* 584 F.2d 6 (2d Cir. 1978).

Rueda's Confession. Rueda's confession, as set out in Agent Aponte's affidavit, was, by itself, a sufficient basis for the Magistrate's finding of probable cause. Defendants, of course, contend that the confession should not have been considered, as it was, in fact, a complete fabrication. We have already stated our reasons for choosing neither to believe nor accept the defendants' repeated condemnation on this score.

In sum, we find that search warrant may issue "when the facts are sufficient to satisfy a reasonably prudent detached and neutral person that a crime is being committed or evidence of it kept on the premises to be searched and that the informant's information has been obtained by him in a reasonably reliable way rather than through neighborhood gossip, conjecture, or mere suspicion." This standard has been amply fulfilled by the affidavit in this case. *U.S. v. Karathonas, supra,* at 29-30; *U.S. v. Ventresca,* 380 U.S. 102 (1965); *U.S. v. Rueda, supra.*

Investigatory tactics. None of the Government's evidence, even that of tertiary value, finds acceptance by any of the defendants who decry all the activities of the DEA agents in tracking them down and seizing the contraband found in their possession. Defendants insist the agents falsely testified about the informant's tip; that it was either a fabrication or illegal as a matter of law. They have objected to the surveillance and eavesdropping conducted by the agents in Room 1702, claiming that by pressing their ears against the crack in the door, the

agents engaged in a "mechanical eavesdropping" all in violation of 18 U.S.C. Sec. 2510, et seq., and the doctrine of *Katz v. U.S.,* 389 U.S. 347 (1967). They vigorously insist tht Rueda's confession to agents (that he took cocaine into the room) following his arrest was a fabrication. They contest the seizure and search of Agapito's attache case, the entry into Room 1701 following the telephone calls, and the "consent" search of Apt. 3B.

We are convinced by the total proof adduced before us that the informant did exist, that he imparted the information testified to and subsequently corroborated by the agents, and that the information was sufficiently reliable and credible, as a matter of law, for the agents to act upon it.

The surveillance by the agents, conducted in Room 1702, clearly does not constitute a violation of the mechanical eavesdropping statute. While it is true that guests in a hotel room are entitled to the expectation of privacy, *Johnson v. U.S., supra, U.S. v. Kendall Isom,* 588 F.2d 858 (2d Cir. 1978), there is no protecting under the law where noises emanating out of a room and audible to the unaided ear, are overheard so long as the agents were lawfully where they were—in Room 1702. The language of 18 U.S.C. %§2510(2), (4) and (5), 2511 and 2515 does not proscribe the interception and use, *by the unaided ear,* of noises and talking loud enough to be overheard beyond the confines of Room 1701. *U.S. v. Llanes,* 398 F.2d 880 (2d Cir. 196g8); *Katz v. U.S., supra.*

The seizure of Agapito's attache case by the arresting agent and immediate opening thereof, was a reasonable search incident to a lawful arrest—well within the limits of this exception to the warrant requirement. *U.S. v. Chadwick,* 433 U.S. 1 (1977); *Chimel v. CAlifornia,* 395 U.S. 752 (1969).

The appropriateness of the agents' actions in entering and securing Room 1701 subsequent to the arrest of Agapito and Calderon is clear. Absent a search without a warrant (and it is the sworn testimony of all the agents that no search was conducted at that time), the doctrine of exigent circumstances en-

titled the agents to take the actions they did in order to protect evidence and their own safety. *Pennsylvania v. Mimms,* 434 U.S. 106 (1977).

In view of our finding that the agents were lawfully in Room 1701, we further find that their actions in answering the telephone in order to pursue their investigation were reasonable, in light of the evidence they hads obtained that the phone was being used to further the sale of narcotics. No conversation of any defendant was intercepted, and their need to immediately pursue the investigation outweighs the prejudicial effect, if any, of what the agents did. *U.S. v. Ceccolini, supra; U.S. v. Scios,* 590 F.2d 956 (D.C. Cir. 1978).

Conclusion

We have found that the actions of the DEA agents throughout their investigation were proper. We find that Ligia's consent to the search of Apt. 3B was voluntarily given. As to defendant Rueda's confession, we simply offer the comment that we frequently find that many a defendant makes a damaging remark under the emotional strain of arrest, only to regret it later. We examined carefully into the totality of defendants' allegations of wrongdoing, and allowed them full scope to develop their points. We do not support their opposition.

We emphasize our findings that the agents behaved properly in all respects as a matter of law, including, of course, their conduct toward the defendants; that their testimony at the hearing was detailed, complete, credible, and unshaken under defendants' sharp cross-examination.

Accordingly, we felt constrained to, and did, deny the motions to suppress evidence on the grounds that the arrests, searches and seizures were lawful and based on probable cause.

SO ORDERED:

New York, N.Y., October 5, 1979.

s/Irving Been Cooper
United States District Judge

FOOTNOTES

1. The indictment reads as follows:

Count 1: From on or about the 5th day of February, 1979, and continuously thereafter up to and including the date of the filing of this indictment [March 1, 1979], in the Southern District of New York, CAlixto Agapito, Martha Calderon and Horacio Rueda, the defendants and others to the Grand Jury known, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute schedule II narcotic drug controlled substances, to wit, cocaine, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Count 2: On or about the 22nd day of February, 1979, in the Southern District of New York, Horacio Rueda, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately eight kilograms of cocaine. (Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A) and Title 18, United States Code, Section 2.)

Count 3: On or about the 22nd day of February, 1979, in the Southern District of New York, H oracio Rueda, the defendant, unlfawfully, wilfully and knowingly did carry a firearm, to wit, a .22 caliber derringer, during the commission of a felony for which he could be prosecuted in a Court of the United States, to wit, violations of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and 846. (18 U.S.C. §924(c)(2).)

Count 4: On or about the 22nd day of February 1979, in the Southern District of New York, Calixto Agapito, Martha Calderon and Horacio Rueda, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine. (Title 21, United States Code, Sections 812, 8i41(a)(1) and 8i41(b)(1)(A) and Title 18, United States Code, Section 2.)

2. On April 30, 1979, we entered a memorandum endorsement on a motion by defendants to suppress evidence seized by the Government pursuant to alleged illegal arrests and searches. The memorandum was entered following a four-day hearing held April 4, 5, 9 and 10, 1979. The memorandum stated on p. 3: "If our commitments in many other matters permit, it is our intention to file an opinion at some distant date. It must be distinctly understood that the order above is our final disposition of the motions to suppress." The instant opinion elaborates the factual and legal findings on which we based our decision to deny the motion to suppress.

Defendants were tried before a jury, commencing May 9, 1979 and a verdict was entered May 23, 1979 finding all three defendants guilty as charged.

3. In the course of the hearing, certain facts were brouoght to the attention of the court which compelled us to direct that the parties refer to the source of the information as "Mr. X," rather than "a close friend" of the informant. An affidavit, dated April 9, 1979, was submitted by the Assistant United States Attorney in the case setting forth the identity of the "close friend" and requesting that the affidavit be sealed in order to protect the source. This affidavit was made a part of the record and ordered sealed. While we find no evidence of misrepresentation or intent to mislead, the language used by the Government, in the proof adduced as to the "close friend," leaves much to be desired; it is limited and demonstrates the exercise of poor judgment. *Franks v. Delaware,* 438 U.S. 154 (1978); *U.S. v. Broward,* No. 78-1409 (2d Cir. March, 1979).

APPENDIX B
Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 413, 414, 484—September Term, 1979
(Argued November 26, 1979 Decided March 12, 1980)
Docket Nos. 79-1257, 79-1265, 79-1377

UNITED STATES OF AMERICA,

Appellee,

-v.-

CALIXTO AGAPITO, MARTHA CALDERON and HORACIO RUEDA,

Appellants.

Before: TIMBERS, VAN GRAAFEILAND and NEWMAN,
Circuit Judges.

Appeals from judgments of conviction entered after a jury trial in the Southern District of New York, Irving Ben Cooper, *District Judge,* for violations of federal narcotics ands firearms laws.

Affirmed.

RONALD D. DEGEN, New York, N.Y. (Barry Ivan Slotnick and Lawrence M. Hermann, New York, N.Y.; Melvin Ravech,

Raymond Sussman, and Ravech & Aronson, Boston, Mass., on the brief), *for appellants, Agapito and Calderon.*

CHARLES SUTTON, New York, N.Y., *for appellant Rueda.*

JEFFREY E. LIVINGSTON, Asst. U.S. Atty., New York, N.Y. (Robert B. Fiske, Jr., U.S. Atty., and Gregory L. Diskant, Asst. U.S. Atty., New York, N.Y., on the brief), *for appellee.*

TIMBERS, *Circuit Judge:*

After an eleven day jury trial in the Southern District of New York, Irving Been Cooper, *District Judge,* appellants Calixto Agapito, Martha Calderon and Horacio Rueda were convicted of conspiring to possess and distribute cocaine, in violation of 21 U.S.C. §846 (1976) (Count One), and possessing with intent to distribute approximately on ekilogram of cocaine, in violation of 21 U.S.C. §841 (1976) (Count Four). Ruyeda also was convicted of possessing with intent to distribute approximately six kilograms of cocaine, in violation of 21 U.S.C. §841 (1976) (Count Two), and carrying a firearm during the commission of a federal felony, in violation of 18 U.S.C. §924(c)(2)(1976) (Count Three).[1]

We feel that the chief questions on appeal relate to the seizure of certain evidence allegedly in violation of the Fourth Amendment. Specifically, appellants raise the following questions:

> (1) Whether federal agents in a hotel room adjoining the hotel room of Agapito and Calderon violated the Fourth Amendment when the agents pressed their ears against a door connecting the two rooms in an attempt to overheard appellants' conversations.
>
> (2) Whether the arrests of appellants were based on probable cause.
>
> (3) Whether the agents' warrantless entry into the hotel room of Agapito and Calderon after their arrests,

although illegal, compels reversal of their convictions.

We hold that the agents' eavesdropping did not violate the Fourth Amnendment and that appellants' arrests were based on probable cause. Although we conclude that the agents' entry into the hotel room was improper, for the reasons stated below we nevertheless affirm the convictions of all appellants on all counts.

I

On the afternoon of February 21, 1979 an informant called Special Agent Victor Aponte of the Drug Enforcement Administration (DEA) with information regarding narcotics activity at the Sheraton Center Hotel in Manhattan. The informant told Aponte that he had received the information from a close friend referred to as "Mr. X."[2] The informant was considered reliable. Previous information from him hads led to at least two search warrants and several arrests and convictions. In addition, information provided by Mr. X to the informant had proven reliable in the past. It had resulted in the issuance of a search warrant, arrests and the seizure of narcotics.

The information provided by Mr. X, as relayed by the informant to Aponte, was that a male and a Cuban female from Miami named Martha hads been in Room 1701 of the Sheraton Center for several days and that they hads approximately four kilograms of cocaine that they wished to sell before the weekend. Mr. X had seen and sampled the cocaine. According to Mr. X, other individuals had sampled the cocaine and were planning to purchase it.

Agents Richard Bell and Jaime Forteza were assigned to the case and arrived 6:00 p.m. that evening. They confirmed with hotel security personnel that a Martha Calderon, with a Miami address, was staying in Room 1701. The hotel records disclosed that she had paid in cash on a daily basis the double room rate of $76 per day, as well as room service and telephone calls.

The agents obtained permission to use Room 1702, which adjoins Room 1701, for surveillance. The door to Room 1701 was open when the agents walked by. They observed Calderon and Agapito inside. Once inside Room 1702 the agents could hear sounds and parts of conversation coming from Room 1701. The two rooms had a common wall with a connecting door. There was a crack between the door and the door frame. By pressing their ears to the crack, the agents could hear additional noises and conversations. Forteza, who had grown up in Cuba, recognized that Calderon spoke with a Cuban accent.

The next day, February 22, Forteza heard the dialing of the phone in Room 1701. He then heard Agapito say to Calderon, "He's bringing it over now." At approximately 2:00 p.m. that afternoon an agent who hads taken up an observation post in Room 1708 observed Horacio Rueda enter Room 1701. Rueda was carrying an attache case and a shoulder bag. He was accompanied by a small boy.

While Rueda was in Room 1701 the agents heard the sounds of tape being torn and paper being shuffled and counted. Aponte, who by this time had joined his colleagues in Room 1702, heard a male voice in Room 1701 say the figures "one-five-zero-zero-zero" during the shuffling sounds.

After fifteen minutes Rueda and the boy left the room but without the attache case and the shoulder bag. Rueda was arrested by DEA agents in the hotel lobby. A search revealed that he was carrying a loaded .22 caliber derringer. He was taken to DEA headquarters. After being advised of his rights he admitted that the attache case he delivered to Room 1701 had contained concaine. There was conflicting testimony as to whether Rueda subsequently retracted that statement. In any event the statement was conveyed by telephone to the agents in Room 1702.

Around 4:00 p.m. that afternoon Agapito and Calderon left Room 1701. Agapito was carrying the attache case delivered by Rueda. DEA agents arrested the two in the hotel lobby, opened the attache case and found $29,000 inside.

After the arrests the agents went upstairs to Room 1701. They were admitted to the room by hotel security personnel. Once inside the agents seized, but did not open, a blue suitcase. They did not otherwise search the room.

At 6:15 p.m. that evening the telephone in Room 1701 rang.Posing as an associate of Agapito and Calderon, Forteza answered the phone. A female, later identified as Ligia Atehortua, inquired as to the whereabouts of Rueda and the boy who was her son. She called back twice and spoke each time to Forteza who was still posing as an associate of Agapito and Calderon. Eventually she gave Forteza permission to come to her apartment at 328 East 25th Street.

Together with three other agents, Forteza went to Atehortua's apartment. He identified himself as a DEA agent and obtained the verbal and written consent of Atehortua to search her apartment. The search resulted in the seizure of six kilograms of cocaine, $2,810 in case, various items of narcotics paraphernalia and several pictures of Rueda. The agents and Atehortua then returned to Room 1701, where she spent the night.[3]

At 4:00 p.m. the following day, February 23, after the agents had been in possession of Room 1701 for almost twenty-four hours, a search warrant was obtained to search the room. The agents opened the blue suitcase which had been seized upon the agents' original entry into the room the day before. They cound approximately one kilogram of cocaine in the suitcase.

An indictment was returned in the Southern District of New York on March 1, 1979 charging appellants with the offenses stated above. Before trial, appellants moved to suppress all post-arrest statements and all evidence seized from them, from Room 1701 and from Atehortua's aspartment. Following a four evidentiary hearing, the district court denied the suppression motions. The trial began May 9, 1979 and concluded May 23 when the jury returned verdicts finding all appellants guilty on all counts as charged. On June 27, 1979 sentences were imposed as stated above. From the judgments of conviction entered on June 27, these appeals have been taken.

II.

In the light of these facts and prior proceedings, we turn first to the question whether the DEA agents violated the Fourth Amendment when they eavesdropped on appellants' conversations by pressing their ears to the door connecting Rooms 1701 and 1702.[4] We hold that they did not.

The starting point for our analysis is *Katz v. United States,* 389 U.S. 347 (1967). There government agents eavesdropped on conversations in a telephone booth by means of an electrronic listening device attached to the top of the booth. Finding that "the Fourth Amendment protects people, not places", *id.* at 351, the Court discarded the trespass analysis applied in prior cases to determine whether a Fourth Amendment search or seizure occurred. *Id.* at 351-53. The Court concluded that, despite the absence of a physical intrusion into the telephone booth, the agents' actions ' 'violated the privacy upon which [the defendant] *justifiably relied* while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353 (emphasis added).

As stated more explicitly in Justice Harlan's oft-cited concurring opinion, the Court established a two-part test for determining whether a Fourth Amendment search or seizure occurred: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that th eexpectation be on ethat society is prepared to recognize as 'reasonable' " *Id.* at 361 (Harlan, J., concurring)(emphasis added).

Subsequent cases have illustrated the two-part *Katz* test. In *United States v. White,* 401 U.S. 745 (1971), for example, the Court upheld the use of the defendant's statements that federal agents had overheard by means of a transmitter worn by an informant during meetings with the defendant.[5] Undoubtedly the defendant in *White* expected that his conversations with the informant would be private. This expectation was held not to be protected, however, because he took the krisk that a person "to

whom he voluntarily confides" would reveal his secrets to the police. *Id.* at 749 (quoting *Hoffa v. United Stats,* 385 U.S. 293, 302) (1966). Thus, the defendant's expectation of privacy was not reasonable.

We have applied the "rewasonable expectation of privacy" principles of *Katz* to non-electronic eavesdropping on several occasions. In *United States v. Llanes,* 398 F.2d 880 (2 Cir. 1968), *cert. denied,* 393 U.S. 1032 (1969), we upheld the eavesdropping by an agent who was positioned outside the defendant's apartment door. *Accord, United States v. Wilkes,* 451 F.2d 938, 941 N.6 (2 Cir. 1971). In *Llanes* we reasoned that an individual who speaks in a tone audible to a person outside his door does not have a reasonable expectation of privacy. 398 F.2d at 883-84. Although the defendant expected that conversations spoken in his apartment would be private, his expectation of privacy was not reasonable. He took the risk that the conversations would be overheard by others. We did not consider it onerous to hold the defendant to such a risk, observing that "[t]he risk of being overheard by kan eavesdropped . . . is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Id.* at 884 (quoting *Hoffa v. United States,* 385 U.S. 293, 303 (1966).[4]

Llanes, however, did not involve an agent pressing his ear to a door. In *United States v. Ortega,* 471 F.2d 1350 (2 Cir. 1972), *cert. denied,* 411 U.S. 948 &1973), we applied the rationale of *Llanes* to such a case by way of dietum. The defendants in *Ortega* raised the possibility that federal agents had overheard their conversations through an adjoining wall. We found nothing illegal in that conduct. We said "[w]hat can be heard by the naked ear is not protected by the Fourth Amendment." *Id.* at 1361. We emphasized again that an individual in modern society assumes the risk of having his conversations oversheard by another. *Id.*

In the instant case appellants invite us to limit the dictum in *Ortega* by holding that law enforcement officers never may place their ears against doors in order to eavesdrop on convere-

sations. In essence, the argument is that eavesdropping is permissible only when the speaker takes the risk of speaking loudly but not when the speaker uses normal tones audible only to an ear pressed to the door. Granted, the argument has a surface appeal; one who speaks in a normal tone may have a more reasonable expectation of privacy then one who speaks loudly. On the facts of this case, however, we find the argument to be unpersuasive. We hold that the expectation of privacy asserted by appellants here is not reasonable. In so holding, we rely upon three critical factors.

First, appellants' conversations were heard by the *naked human ear.* Regardless of whether the tones may be described as loud or normal, the fact remains that appellants were talking *loud enough* to be heard by others in an adjoining room. The agents were unaided by any artificial, mechanical or electronic device.[7]

Second, the agents had a legal right to be in the adjoining room. We decline to restrict their movements in their own room in order to prevent the overhearing of conversations in an adjoining room. It strikes us as impractical to permit an agent in an adjoining room to listen while standing immediately next to a wall or connecting door without touching it but to prohibit him from listening by moving his ear several inches and pressing it against the wall or connecting door. The Ninth and Fifth Circuits, in rejecting claims identical to that asserted here, likewise have found it unwise to sanction the type of hair-splitting distinctions urged upon us in the instant case. As the Ninth Circuit has put it:

> "Appellants would have us divide the listening room into privileged or burdened areas, and the conversations into degrees of audibility to, we presume, the normal ear[:] thus a remark heard on the bed arguably admissible, but not those heard at the door, a loud remark admissible, arguably one uttered in 'normal' tones, but definitely not one whispered. We find no precedent for a categorization involving such hair-splitting distinctions and we are not

disposed to create one." *United States v. Fisch,* 474 F.2d 1071, 1077 (9 Cir.) (per curiam), *cert. denied,* 412 U.S. 921 (1973), *quoted in United States v. Jackson,* 588 F.2d 1046, 1054 (5 Cir. 1978), *cert. denied,* __U.S.__, 47 U.S.L.W. 3813 (1979).

We emphasize that the agents had a legal right to be where they were. The door to which their ears were pressed was a shared door. It connected Rooms 1701 and 1702. The agents' ears were pressed against the agents' side of the shared door. What can be heard by the naked ear, when the ear is where it has a right to be, is not protected by the Fourth Amendment.

This is not to suggest of course that the absence of a trespass is a controlling factor in determining the applicability of the Fourth Amendment. *Katz* clearly outlaws that analysis. We adhere to the "reasonable expectation of privacy" principles of *Katz.* Our holding is predicated on the assumption that "the location of the government surveillant vis-a-vis the individual surveilled is . . . a factor to be considered in assessing the justifiability of the individual's privacy expectations." *United States v. Jackson, supra,* 588 F.2d at 1054; *accord, United States v. Fisch, supra,* 474 F.2d at 1078; *see Rakas v. Illinois,* 439 U.S. 128, 144 n. 12 (1978) ("[T]he Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment.") In view of the absence of electronic eavesdropping here, we believe that our approach is consistent with *Katz.*

Third, appellants were in a hotel room. True, the occupants of a hotel room are entitled to the protection of the Fourth Amendment. *E.g., Hoffa v. United States,* 385 U.S. 293, 301 (1966). But the reasonable privacy expectations in a hotel room differ from those in a residence. The reasonableness of an individual's privacy expectations appropriately may be considered in the context of a "place." *United States v. Jackson, supra,* 588 F.2d at 1052 ("[W]hat is reasonable in one setting may be unreasonable in another. . . ."). As Justice

Harlan pointed out in his concurring opinion in *Katz,* while the Fourth Amendment protects people, not places, "[t]he question . . . is what protection it affords those people. Generally, as here, the answer to that question requires reference to a 'place.' " 389 U.S. at 361.

The Fifth Circuit has pointed out some of the differences between the privacy of a motel or hotel room and a residence in the context of Fourth Amendment rights:[8]

> "[D]espite the fact that an individual's Fourth Amendment rights do not evaporate when he rents a motel room, the extent of the privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attributes of privacy of a home, it also possesses many features which distinguish it from a private residence: 'A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home.' *Marullo v. United States,* 328 F.2d 361, 363 (5 Cir. 1964)." *United States v. Jackson, supra,* 588 F.2d at 1052.

In view of the transient nature of hotel guests, moreover, one cannot be sure who his neighbors are in a hotel room. A person in a residence generally knows who his neighbors are. A person in a hotel room therefore takes a greater risk than one in a residence that, instead of neighbors, an adjoining room may contain strangers or, as in this case, even persons with interests adverse to his own.[9]

In view of the "open, public, and shared atmosphere", together with the "nearness" and transience of one's neighbors in a hotel room, *United States v. Jackson, supra,* 588 F.2d at 1052, we believe that an occupant of a hotel room with connec-

ting doors cannot reasonably assume that his conversations—even those spoken in a normal tone—never will be overheard by others in an adjoining room. Sound travels. Often it will travel to an adjoining room. And when the adjoining room has a connecting door, as in this case, sound may well be expected to travel from one adjoining room to another.

It may not have been gentlemanly of the agents to press their ears against the door in order to overhear conversations. But the same can be said of many other constitutionally permissible investigatory techniques. *Id.* at 1053; *United States v. Fisch, supra,* 474 F.2d at 1077. We are concerned here with the "competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). The specific question before us is whether the agents violated the Fourth Amendment. We hold that they did not.

III.

We turn next to appellants' contentions that their arrests were illegal for lack of probable cause. The applicable standard is well settled, namely, that "probable cause to arrest exists when an officer has knowledge of facts and circumstances 'sufficient to warrant a prudent man in believing' that an offense is being or has been committed." *United States v. Rueda,* 549 F.2d 865, 870 (2 Cir. 1977) (quoting *Beck v. Ohio,* 379 U.S. 89, 91 (1964)). Applying that standard to the facts of this case, we hold that there was probable cause for appellants' arrests.

A.

With respect to the arrest of Rueda, the agents acted upon information received from their reliable informant and his reliable source. This was corroborated by the agents' own observations. Although the informant's tip did not refer to Rueda, his conduct provided an ample basis from which the agents reasonably could have concluded that he was connected with the narcotics trafficking disclosed by the tip.

The informant's tip clearly disclosed criminal activity in Room 1701. Mr. X, the informant's source, had stated that Agapito and Calderon were selling cocaine in the room. Mr. X had seen and sampled the cocaine. And according to Mr. X, other persons had sampled the cocaine and were planning to purchase it.

Applying the standards set forth in *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969), we hold that this information provided a reliable basis for action by the agents. As stated above, both the informant and Mr. X had given reliable information relating to narcotics transactions in the past. Moreover, the nature of Mr. X's information indicated that it was based upon firsthand observation. Arresting officers may act upon information provided by an eyewitness to a crime without a showing of reliability of the witness or his information. *United States v. Rollins,* 522 F.2d 160, 164 (2 Cir. 1975), *cert. denied,* 424 U.S. 918 (1976).

Furthermore, the agents confirmed significant portions of the information provided by Mr. X. They learned that Room 1701 was occupied by a male and a Cuban female named Martha, as Mr. X had stated. The agents also overheard conversations indicating that goods were for sale in the room. The corroboration of these otherwise innocent facts justified the agents' reliance on Mr. X's information. *E.g., United States v. Dien,* 609 F.2d 1038, 1043 (2 Cir. 1979), *modified on rehearing,* slip op. 5941 (Jan. 31, 1980).

By the time Rueda arrived on the scene, therefore, the agents knew, based upon Mr. X's information and their own observations, that Agapito and Calderon were dealing in cocaine and that they were expecting visitors to purchase the cocaine. In view of these facts, Rueda's actions strongly indicated that he was connected with narcotics trafficking. He and the small boy who accompanied him were the only visitors to the room during the two days it was under surveillance. When Rueda was in the room, the agents heard sounds suggesting the counting of large sums of money—facts indicative of narcotics

trafficking. *United States v. Tramunti,* 513 F.2d 1087, 1105 (2 Cir.), *cert. denied,* 423 U.S. 832 (1975). Finally, Rueda obviously had made a delivery to the room. He entered the room with an attache case and shoulder bag. He left with neither.

Accordingly, we hold that, since the agents had "knowledge of facts and circumstances 'sufficient to warrant a prudent man in believing' " that Rueda was a participant in a narcotics conspiracy, United States v. Rueda, supra, 549 F.2d at 870, there was probable cause for his arrest.[10]

B.

With respect to the arrests of Agapito and Calderon as they left Room 1701 with the attache case, it follows a fortiori from what we have said regarding the arrest of Rueda that there was probable cause for the arrests of Agapito and Calderon.

As stated above, Rueda was not mentioned in the informant's tip; the agents had to infer his criminal role from his actions and the other activity in Room 1701. As for Agapito and Calderon, on the other hand, the agents had direct, corroborated information that they, as the occupants of Room 1701, were dealing in cocaine.

Moreover, Rueda's confession that he had delivered cocaine to the room established probable cause for the arrests of Agapito and Calderon. Appellants attack the government's reliance on Rueda's confession to establish probable cause for the arrests of Agapito and Calderon on the ground that Rueda later recanted. While there is some question whether Rueda in fact did recant, that is irrelevant to our present inquiry. For even if Rueda did recant, the agents were entitled to believe his confession and not his recantation. A statement against penl interest, especially one that is consistent with all other known information, is more reliable than a statement which seeks to exculpate a person charged with crime.

We hold that there was probable cause for the arrests of Agapito and Calderon.

IV.

This brings us to appellants' claim that the agents' warrantless entry into Room 1701 following the arrests of Agapito and Calderon was illegal. We hold that the entry was illegal but that such illegal entry, under the circumstances of this case, does not require reversal of appellants' convictions.

A.

At the outset we must consider the Supreme Court's decision in *Rakas v. Illinois,* 439 U.S. 128 (1978). Prior to *Rakas,* the analysis of a Fourth Amendment claim involved two questions. The first was whether the defendant had standing to challenge the search or seizure. *Alderman v. United States,* 394 U.S. 165 (1969). If that question was answered in the affirmative, the second question involved the merits of the defendant's claim.

In *Rakas,* however, the Court dispensed with the initial question of standing as a "theoretically separate" concept and treated it as subsumed within substantive Fourth Amendment doctrine. 439 U.S. at 138-40.

While the Court in *Rakas* may have dispensed with the rubric of standing, subsequent decisions have indicated that Fourth Amendment analysis continues to involve the same two questions. *E.g., United States v. Frezzo Brothers, Inc.,* 602 F.2d 1123, 1130 n.11 (3 Cir. 1979); *United States v. Salvucci,* 599 F.2d 1094, 1097-98 (1 Cir.), *petition for cert. filed,* 48 U.S.L.W. 3119 (1979); *United States v. Whitaker,* 592 F.2d 826, 828 n.2 (5 Cir.), *cert. denied,* __U.S.__, 48 U.S.L.W. 3320 (1979); *United States v. Ochs,* 595 F.2d 1247, 1252-53 (2 Cir.), *cert. denied,* __U.S.__, 48 U.S.L.W. 3323 (1979); *United States v. Culbert,* 595 F.2d 481, 481-82 (9 Cir. 1979) (per curiam). "[A] court must still ask whether the complaining party possessed a fourth amendment interest impinged by the search, before

considering whether the search was 'reasonable.' " *The Supreme Court, 1978 Term,* 93 Harv. L. Rev. 60, 176 (1979).[11]

Our initial inquiry, therefore, is whether appellants are entitled to challenge the agents' entry into Room 1701. This in turn depends upon whether appellants had a legitimate expectation of privacy in the room. *Rakas v. Illinois, supra,* 439 U.S. at 143; *United States v. Ochs, supra,* 595 F.2d at 1252-53. There is no doubt that Agapito and Calderon had such expectation of privacy. As the lawful occupants of the room, they clearly have standing to challenge the entry.

Rueda's claim, however, is on a different footing. He was a mere visitor in the room. In *Rakas* the Court stated that "a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends" has no expectation of privacy in the house and "it advances no purpose served by the Fourth Amendment to permit [the visitor] to object to the lawfulness of the search." 439 U.S. at 142. This applies to Rueda. We hold that he fails the legitimate expectation of privacy test. *United States v. Hodge,* 594 F.2d 1163, 1165 (7 Cir. 1979).

This does not end our inquiry, however, with respect to Rueda's standing claim. He is entitled to challenge the entry under the automatic standing rule of *Jones v. United States,* 362 U.S. 257 (1960). Under that rule, a defendant is granted standing to challenge a search or seizure when the same possession needed to establish standing is an essential element of the offense charged. *Id.* at 261-63. That is the situation with respect to Rueda here. The current rationale for the rule is that it eliminates the vice of prosecutorial self-contradiction, i.e., allowing the government to charge possession as an element of the crime and at the same time deny that there was possession sufficient to establish standing to challenge a search or seizure. *United States v. Penco,* __ F.2d __ (2 Cir. 1979), slip op. 4503, 4511 (Sept. 6, 1979).

The effect of *Rakas* on the automatic standing rule is unclear. *United States v. Ochs, supra,* 595 F.2d at 1253 n.4; *cf.*

Rakas v. Illinois, supra, 439 U.S. at 135 n.4. The Court in *Rakas* did state that even casual visitors could "contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." *Id.* at 143 n. 11. The Ninth Circuit has read this to mean that the Supreme Court has reaffirmed in principle the automatic standing rule. *United States v. Mazzelli,* 595 F.2d 1157, 1159-60 (9 Cir.), *petition for cert. filed,* 48 U.S.L.W. 3154 (1979). In any event, the rationale behind the rule—the elimination of prosecutorial self-contradiction—remains sound. We hold under the circumstances of this case, and until we are instructed otherwise, that *Rakas* does not foreclose Rueda and defendants similarly situated from invoking the automnatic standing rule.[12]

Applying the principles of the automatic standing rule to Rueda, he was entitled to challenge the entry into Room 1701 with respect to the charge that he was in possession of the one kilogram of cocaine found in Room 1701. Possession of that cocaine was an essential element of the offense of possession with intent to distribute charged in Count Four. The automatic standing rule therefore is applicable to Rueda on that count. *United States v. Penco, supra,* __ F.2d at __, slip op. at 4512.

Rueda, however, was not entitled to invoke the automatic standing rule to challenge the entry into Room 1701 with respect to the conspiracy with which Rueda was charged in Count One. "[T]he conspiracy count does not bring into play the automatic standing rule . . . Possession is 'neither a necessary . . . or a sufficient' element of the conspiracy charge and therfore the test for automatic standing . . . is not satisfied." *Id.* at 4512 (quoting *United States v. Oates,* 560 F.2d 45, 55-56 & n. 6 (2 Cir. 1977)).

We also must consider whether Rueda has automatic standing to challenge the illegal entry with respect to Count Two which charges him with possession of the six kilograms of cocaine found in Atehortua's apartment. The agents discovered this cocaine as a result of the phone calls from Atehortua which they intercepted following their entry into Room 1701. Thus,

the entry into Room 1701, if it was illegal, would affect the conviction on Count Two. We conclude, however, that Rueda is not entitled to avail himself of the automatic standing rule with respect to Count Two. The rule relates to possessory offenses for contraband found in premises allegedly entered illegally, not in an apartment located on the other side of the city. "The vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes, is not present." *Brown v. United States,* 411 U.S. 223, 229 (1973). Here the government charged possession of the cocaine found in Atehortua's apartment but denied that Rueda had a possessory interest in Room 1701. These are not "contradictory positions. ' *Id.* Thus, Rueda cannot object to the entry into Room 1701 insofar as it relates to his conviction for the possession of the cocaine found in Atehortua's apartment.[13]

To summarize under this section of our opinion: we hold (1) that, since Agapito and Calderon had a legitimate expectation of privacy in Room 1701, they were entitled to challenge the agents' entry into that room with respect to the search and evidence seized for use on all counts in which they were named; and (2) that Rueda, under the automatic standing rule, also was entitled to challenge the entry into Room 1701, but only with respect to the charge that he was in possession of the one kilogram of cocaine found in Room 1701.

B.

To the extent that appellants have standing to assert their claims that the agents' entry into Rom 1701 was illegal, we turn now to the merits of their claims.

The general rule of course is that a warrantless search of a dwelling or, as in this case, a hotel room, is constitutionally prohibited, even though there may be probable cause for the search. *Vale v. Louisiana,* 399 U.S. 30, 34 (1970); *Chimel v. California,* 395 U.S. 752, 760-62 (1969).[14] Under certain cir-

cumstances, however, immediately following an arrest, law enforcement officers without a warrant may be permitted to conduct a security check—a very quick and limited pass through the premises to check for third persons who may destroy evidence or pose a threat to the officers. *United States v. Christophe,* 470 F.2d 865, 869 (2 Cir. 1972), *cert. denied,* 411 U.S. 964 (1973).[15]

The "reasonableness" of a security check is simply and straightforward. From the standpoint of the individual, th eintrusion on his privacy is slight; the search is cursory in nature and is intended to uncover only "persons, not things." *United States v. Bowdach,* 561 F.2d 1160, 1168 (5 Cir. 1977). Once the security check has been completed and the premises secured, no further search—be it extended or limited—is permitted until a warrant is obtained. From the standpoint of the public, its interest in a security check is weighty. The delay attendant upon obtaining a warrant could enable accomplices lurking in another room to destroy evidence. More important, the safety of the arresting officers or membes of the public may be jeopardized. Weighing the public interest against the modest intrusion on the privacy of the individual, *Pennsylvania v. Mimms,* 434 U.S. 106, 108-109 (1977); *Terry v. Ohio,* 392 U.S. 1, 20-21 (1968), a security check conducted under the circumstances stated above satisfies the reasonableness requirement of the Fourth Amendment.

In the instant case, the agents' entry into Room 1701 cannot be justified as a security check. The agents had the room under constant surveillance for two days. Any belief by the agents that third persons were in the room would not have been reasonable. If anything, their surveillance indicated that the room was empty. Agents in Room 1702, the adjoining room, eavesdropped on conversations in Room 1701. An agent in Room 1708 monitored the hallway outside the room. At one point the agents had looked into the room through its open door. At no time did the agents hear or see anyone in the room other than appellants,[16] who by the time of the entry were under arrest. Under these circumstances, the security check exception to the warrant requirement is inapplicable.

The government's reliance on *United States v. Christophe, supra,* we believe is misplaced.[17] The instant case is sharply distinguishable. The security check in *Christophe* followed a lawful arrest *inside* the premises. In contrast, the arrests of Agapito and Calderon took place in the hotel lobby—seventeen floors removed from Room 1701. Thus, even if the agents here thought that accomplices remained in the room, there was no reason for them to believe that the accomplices knew of the arrests so that they might destroy evidence or somehow "attack" the agents.[18]

The government's attempted justification of the entry in the instant case as a security check is subject to another infirmity. As stated above, we view the intrusion on privacy occasioned by a security check to be minimal; a determination of whether third persons are on the premises requires neither a lengthy nor disruptive stay. *United States v. Jackson,* 533 F.2d 314, 316 (6 Cir. 1976). The intrusiveness of this security check was far from minimal. Following their entry, the agents were in Room 1701 intermittently until the search warrant was obtained almost twenty-four hours later. They seized a suitcase, intercepted phone calls, and arranged for the room to be used as overnight sleeping quarters for Atehortua. In short, they moved in. Once it was determined that third persons were not present, the agents should have left the room.[19] The public interest thereafter in securing the room, located on the seventeenth floor of a hotel, could have been served just as well by stationing a guard outside the door.

In view of the intrusiveness of the agents' stay and the fact that their surveillance should have indicated to them that no one else was in the room, we hold that the warrantless entrry into Room 1701 cannot be justified as a security check and was illegal.[20]

C.

Finally, this brings us to the effect of the illegal entry on appellants' convictions. We hold that the convictions of all appellants on all counts must be affirmed.

Rueda's conviction for carrying a firearm during the commission of a federal felony may be disposed of summarily. His arrest and the subsequent discovery of his gun occurred prior to the illegal entry. His conviction, therefore, is unaffected if he was engaged in the commission of a federal felony while carrying the gun. We conclude that he was. His conviction on Count Three is affirmed.

As for Rueda's conviction for possession of the six kilograms of cocaine found in Atehortua's apartment, we have held that Rueda was not entitled to challenge the illegal entry into Room 1701 with respect to that count. His conviction on Count Two is affirmed.[21]

In reviewing appellants' convictions on Counts One and Four which charged, respectively, conspiracy and possession with intent to distribute one kilogram of cocaine found in Room 1701, we have held that Agapito and Calderon have standing to challenge the entry with respect to their convictions on both of these counts; but that Rueda is entitled to challenge the entry only with respect to Count Four, the possession count. For the reasons that follow, we hold that the convictions of these appellants on each of these counts must be affirmed.

Although the agents seized the suitcase in Room 1701 which contained the cocaine, they did not open it until after the warrant had been obtained. The one kilogram of cocaine, therefore, was admissible if the warrant was valid. *United States v. Christophe, supra,* 470 F.2d at 869. The affidavit in support of the warrant, however, refers to the cocaine, money and drug paraphernalia seized at Atehortua's apartment. Assuming that these items were tainted because they were obtained directly as a result of the telephone calls intercepted during the agents' illegal stay in Room 1701, we nevertheless hold that this does not compel reversal of the convictions, for the following reasons.

Two untainted portions of the affidavit contain a sufficient showing of probable cause to render the warrant valid, despite the reference to tainted events which occurred after the illegal entry. *United States v. Giordano,* 416 U.S. 505, 554-56 (1974) (Powell, J., concurring in part and dissenting in part) (collecting cases); *Parts Mfg Corp. v. Lynch,* 129 F.2d 841, 842-43 (2 Cir.), *cert. denied,* 317 U.S. 674 (1942); *United States v. Cognato,* 408 F.Supp. 1000, 1005 (D. Conn.) (Newman, J.), *aff'd mem.,* 539 F.2d 703 (2 Cir. 1976) *cert. denied,* 430 U.S. 956 (1977). First, Rueda's confession that he had delivered cocaine to Room 1701 established probable cause that cocaine was in the room. Second, the reliable information furnished by Mr. X, which was corroborated by the agents' own observations, provided ample probable cause. True, the past reliability of Mr. X was not set forth in the affidavit and cannot be considered in assessing the validity of the warrant. *Aguilar v. Texas, supra,* 378 U.S. at 109 n.1. But "[s]pecific allegations of reliability or past reliable contact are not required when the informant in question [here Mr. X] was an eyewitness to the crime." *United States v. Rollins, supra,* 522 F.2d at 164. As stated above, the information supplied by Mr. X indicated that it was based on first-hand observation.

Since the warrant was validly issued, the evidence seized pursuant to the warrant was admissible. That evidence, primarily the one kilogram of cocaine found in the suitcase in Room 1701, constituted overwhelming proof of guilt on the counts which charged conspiracy and possession with intent to distribute one kilogram of cocaine. The convictions of all appellants on Counts One and Four are affirmed.

V.

To summarize:

(1) The agents did not violate the Fourth Amendment when they pressed their ears against the door connecting Rooms 1701 and 1702 in order to overhear appellants' conversations.

(2) The agents had probable casuse to arrest appellants.

(3) (a) Agapito and Calderon had a legitimate expectation of privacy in Room 1701 and were entitled to challenge the agents' entry into the room. Rueda was entitled to challenge the entry under the automatic standing rule, but only with respect to the charge that he was in possession of the one kilogram of cocaine found in Room 1701.

(b) The agents' warantless entry into Room 1701, not being justified as a security check, was illegal.

(c) Despite the illegal entry, since the search warrant used to seize the one kilogram of cocaine in Room 1701 was valid, appellants' convictions on Counts One and Four for conspiracy and possession with intent to distribute that cocaine are affirmed.

(d) Rueda's convictions on Counts Two and Three are affirmed.

We have considered carefully appellants' other claims of error and find them to be without merit.

Affirmed.

FOOTNOTES

1. Following the return of the jury's verdicts finding all appellants guilty on all counts as charged, the district court sentenced appellants as follows:

   Agapito — Concurrent five year terms of imprisonment on Counts One and Four, to be followed by concurrent three year special parole terms on each count.
   Calderon — One year term of imprisonment on Count One, with credit for time served; five year term of imprisonment on Count Four, execution suspended and appellant ordered to serve five year term of probation; three year special parole terms on Counts One and Four, to commence on expiration of confinement.

   Rueda — Concurrent seven year trms of imprisonment on Counts One, Two and Four, to be followed by concurrent ten year special parole terms on each count, three year term of imprisonment on Count Three, to be served consecutively to sentences on Counts One, Two and Four.

2. The government asked that the identity of "Mr. X" not be disclosed. It submitted a supporting affidavit setting forth his identity but representing that the affidavit be sealed in order to protect the source.

3. Atehortua was never arrested. She returned to her apartment the next day and subsequently disappeared. She did not testify at the suppression hearing or at the trial.

4. Although the three appellants asserted this claim in the district court, only Rueda presses it on appeal. We conclude that Rueda, though only a casual visitor to the hotel room of Agapito and Calderon, is entitled to challenge the eavesdropping under the automatic standing rule because, in addition to the conspiracy charge, he was charged with possession of the cocaine, found in Room 1701. Section IV(A) of this opinion, *infra, United States v. Penco*, __, __ (2 Cir. 1979), slip op. __F.2d 4503, 4510-12 (Sept. 6, 1979).

5. The plurality opinion in *White* is authoritative on this point. *United States v. Horton,* 6701 F.2d 319, 320-21 & n.1 (7 Cir. 19769); *United States v. Baranno,* 487 F.2d 654, 657 n.1 (2 Cir. 1973); *cf. United States v. Miller,* 425 U.S. 435, 443 (1976).

6. The *Hoffa* Court, in turn, was quoting Justice Brennan in *Lopez v. United States,* 373 U.S. 427, 465 (1963) (dissenting opinion).

7. The absence of electronic eavesdropping of course is significant. As Justice Brennan has pointed out:

> "[T]here is a qualitative difference between electronic surveillance . . . and conventional police strategems such as eavesdropping . . . latter [does] not so seriously intrude upon the right of privacy . . . . [Eavesdropping] is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." *Lopez v. United States, supra,* 373 U.S. at 465-66 (dissenting opinion), *quoted* in *United States v. Llanes, supra,* 398 F.2d at 864.

8. While *Jackson* dealt only with motel rooms, it is equally applicable to hotel rooms.

9. An apartment of course has features common to both a private home and a hotel room. This case does not involve an apartment only a hotel.

10. That Rueda's actions also were susecptible of an innocent interpretation does not warrant a contrary holding. "[A]n officer need not be able to negate all possible lawful explanations of a situation before making an arrest." *United States v. Rodriguez,* 532 F.2d 834, 838 (2 Cir. 1976).

11. The same commentator notes that *Rakas* "appears to have more conceptual than practical effect . . . . [The] initial inquiry is precisely the same question that many courts have long asked under the rubric of 'standing'." 93 Harv. L. Rev. at 176.

12. Other Circuits also have continued to apply the automatic standing rule following *Rakas. United States v. Byers,* 600 F.2d 1130, 1132 (5 Cir. 1979); *United States v. Salucci, supra,* 599 F.2d at 1097-98; *United States v. Mazzelli, supra,* 595 F.2d at 1159-60.

13. Since the events leading to the charge against Rueda in Count Three—carrying a firearm during the commission of a federal felony—all occurred prior to the entry into Romo 1701, his conviction under that count is unaffected by the entry.

14 The general rule is subject to "a few specifically established and well-delineated exceptions." *Katz v. United States, supra,* 389 U.S. at 357. *E.G., Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973) (consent); *Chimel v. California, supra,* 395 U.S. at 762-63 (search incident to an arrest); *Warden v. Hayden,* 387 U.S. 294, 298-99 (196t7) (hot pursuit). None of these exceptions is applicable here.

15. Our recent decision in *United States v. Dien,* 609 F.2d 1038 (2 Cir. 1979), *modified on rehearing,* slip op. 5941 (Jan. 31, 1980) does not control this case. In *Dien* federal agents entered the premises of a suspect and proceeded to question him. Subsequently the agents conducted a warrantless search of a concealed area of a room and, after detecting the odor of raw marijuana, arrested the suspect. We rejected the government's attempted justification of the search as a security check. As our opinion explains, *Dien* clearly was not a security check case. The search was not made immediately upon entering the room, thereby undermining the agents' claim that they were looking for others. *Id.* at 1047.

16. We of course exclude the small boy who entered and left the room with Rueda.

16. *United States v. Diaz,* 577 F.2d 821 (2 Cir. 1978), also cited by the government, we think is not pertinent. Although there was a security check following an arrest inside the premises, *id.* at 823, our opinion does not comment on the propriety of the security check. It dealt with the agents' *presence* on the premises following the security check, as opposed to the legality of the entry into the premises. *Id.* at 823-24.

18. We do not suggest that law enforcement officers who arrest an individual outside the premises never may conduct a security check inside the premises. *United States v. Baker,* 577 F.2d 1147, 1152 (4 Cir.), *cert. denied,* 439 U.S. 850 (1978); *United States v. Bowdach, supra,* 561 F.2d at 1168-69. We hold only that in such a case, the arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public. *Cf. United States v. Campbell,* 581 F.2d 22, 25 (2 Cir. 1978) (exigent circumstances neededc for warantless entry into home to make an arrest supported by probable cause); *United States v. Reed,* 572 F.2d 412, 424 (2 Cir.) (same), *cert. denied,* 439 U.S. 871 (1978).

19. We distinguish cases wehre third persons are discovered on the premises who the agents do not have probable cause to arrest but who nevertheless might destroy evidence. *E.g., United States v. Diaz, supra,* 572 F.2d at 823-24 (defendant's roommate); *United States v. Christophe, supra,* 470 F.2d at 869 (defendant's wife). Under these circumstances, arresting officers may have to remain on the premises following a security check. As Judge Friendly stated in *Diaz,* there may be "no other practical means" of securing the premises until a warrant can be obtained." 572 F.2d at 824 n.3.

20. The district court also found the entry proper because the agents reasonably believed that associates of appellants would make phone calls in furtherance of their criminal activity. It reasoned that "[t]he paramount importance of continuing the investigation and possibly discovering the identity of other members of this conspiracy" justified the entry. Even assuming that the agents had such a belief, the district court's pproach appears to have no support in the case law, so far as we know. There is no "continuing the investigation" exception to the warrant requirement and we decline to create one. *United States v. Campbell, supra,* 581 F.2d at 25-26, cited by the district court, we do not believe supports the court's approach. There we stated that officers with a reasonable belief that a suspect may escape, destroy evidence or continue the commission of an ongoing crime were entitled to make a warrantless entry into a home in order to arrest the suspect. *Id.* at 26. We did not suggest that an officer's

interest in continuing an investigation after an arrest constituted a sufficient exigent circumstance to justify a warrantless search.

21 Rueda also challenges the search of Atehortua's apartment on the ground that she did not voluntarily consent to the search. We disagree. There is no indication in the record that her consent was coerced. Rueda's principal argument is that Atehortua's initial verbal consent was involuntary because the agents did not inform her that she could refuse permission to search. But knowledge of the right to refuse, though a factor in determining voluntariness, is not a prerequisite to a consent search. *Schneckloth v, Bustamonte, supra,* 412 U.S. at 249. Moreover, the agents informed Atehortua of her right to refuse before she signed the written consent form.

APPENDIX C
Order Denying Cetition xor Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of May, one thousand nine hundred and eighty.

Present: Hon. William H. Timbers; Hon. Ellsworth Van Graafeiland; Hon. Jon O. Newman, *Circuit Judges.*

79-1257; 79-1265; 79-1377

UNITED STATES OF AMERICA,

Appellee,

v.

CALIXTO AGAPITO, MARTHA CALDERON and HORACIO RUEDA,

Appellants.

A petition for a rehearing having been filed herein by counsel for the Appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO, *Clerk.*

Order Denying Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of May, one thousand nine hundred and eighty.

NOS. 79-1257, 79-1265; 79-1377

UNITED STATES OF AMERICA,

Appellee,

v.

CALIXTO AGAPITO, MARTHA CALDERON and HORACIO RUEDA,

Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested thatr a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ IRVING R. KAUFMAN
Chief Judge

APPENDIX D
Affidavit for Search Warrant

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Docket No. 79, Case No. 225

In the Matter of An Application of the
UNITED STATES OF AMERICA,

vs.

for a warrant to search premises known as Room 1701 of the Sheraton-Americana Hotel, 810 Seventh Avenue, New York, New York, including a suitcase and shoulder bag located therein

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BEFORE: HONORABLE KENT SINCLAIR

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Room 1701 of the Sheraton-Americana Hotel, 810 Seventh Avenue, New York, New York, including a suitcase and shoulder bag located therein in the Southern District of New York there is now being concealed certain property, namely, cocaine, . . . and narcotics paraphernalia which are contraband property intended for use in the commission of Federal criminal offenses, in the aforementioned . . . are being used for the commission of violations of 21 U.S.C. §§ 812, 841 and 846.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

* * * * * *

1. I am a Special Agent of the Drug Enforcement Administration, United States Department of Justice.

2. In addition to my own observations made from Room 1702 during the time mentioned below, the source of the information below is statements to me by other Special Agents of the Drug Enforcement Administration.

(a) That on February 21, 1979, an informant who has proven reliable on several occasions in the past, having given information and testimony leading to seven or eight convictions and at least one search warrant, called a special agent DEA and informed said agent in substance that a close friend of the informant informed the informant that he had been inside Room 1701 at the Sheraton-Americana Hotel, 810 Seventh Avenue, New York, New York and had seen there approximately four kilograms of cocaine and, further, that the room was occupied by a man and a woman named Martha.

(b) That on February 21, 1979, DEA agents went to the Sheraton-Americana Hotel, 810 Seventh Avenue, New York, New York and confirmed through hotel security personnel that a female by the name of Martha had occupied Room 1701 for several days and had been recently joined there by a male and that the female paid for the room on a daily basis in cash.

(c) That special agents of the DEA occupied Room 1702, which adjoins Rom 1701.

(d) That the agents in Room 1702, through overhearing parts of conversations through the door of Room 1701, determined that a male and a female were in Room 1701 and that from approximately 6 P.M. on February 21, 1979 to approximately 4 P.M. on February 22, 1979, the female left Room 1701 on only two occasions and that the male left the room until just prior to his arrest.

(e) That agents i Room 1702 overheard the female answer a telephone call in Room 1701 and a conversation between the male and female in Room 1701 indicated that the person calling Room 1701 was to arrive at Room 1701 on the following day at approximately 11 A.M.

(f) That at approximately 12:30 P.M. on February 22, 1979, agents in Room 1702 overheard one of the persons in

Room 1701 and state in substance that I am in 1701 come on down.

(g) That agents of the DEA observed a male individual subsequently determined to be Horacio Ruede, carrying a shoulder bag and that after his arrival at the apartment, agents in Room 1702 heard sounds of a ripping and a shuffling, suggesting the tearing of tape and/or the counting of money.

(h) That Horacio Rueda left Room 1701 without the shoulder bag, was arrested while leaving the Sheraton-Americana Hotel, 810 Seventh Avenue, New York, New York, and was found to be in possession of a loaded .22 caliber Derringer.

(i) That after being advised of his rights, Horacio Rueda stated to an agent of the DEA that he had delivered cocaine to Room 1701.

(j) That subsequent to the admissions of Horacio Rueda, the male and female in Room 1701 subsequently determined to be Calixto Agapito and Martha Calderon left Room 1701, Calixto Agapito carrying an attache case, and were shortly thereafter arrested.

(k) That the attache case carried by Calixto Agapito, at the time of his arrest, contained $29,000 in cash.

(l) That agents of the DEA were subsequently admitted to Rom 1701 by hotel security personnel and after determining that no other persons were in the room, secured said room and that in the room are a suitcase and shoulder bag.

(m) That while in Room 1701, the telephone rang and was answered by a Spanish speaking agent who then assumed an undercover role indicating he was an associate of the persons who hads occupied Room 1701.

(n) That after two or three conversations with the same female who called Room 1701, the undercover agent received permission from the woman to come to her apartment in Manhattan to transact some business.

(o) That the undercover officer went to said apartment in Manhattan, Apartment 3B, 328 East 85th Street, New York,

New York, was admitted by the female and observed cocaine in plain view and after identifying himself, was permitted to conduct a . . . search, resulting in the discovery of approximately seven kilograms of cocaine and narcotics parapheranalia. And, further, there were numerous pictures of the woman in said apartment together with Horacio Rueda.

s/Victor Aponte, Special Agent,
Drug Enforcement Administration

Sworn to before me this
23rd day of February, 1979

s/ Kent Sinclair, Jr.
HON. KENT SINCLAIR, JR.
United States Magistrate
Southern District of New York